No. 15264

United States
Court of Appeals
for the Ninth Circuit

ORION SHIPPING AND TRADING COMPANY, a corporation, and PACIFIC CARGO CARRIERS CORPORATION,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington
Northern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-16-57

No. 15264

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ORION SHIPPING AND TRADING COMPANY, a corporation, and PACIFIC CARGO CARRIERS CORPORATION,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington
Northern Division

NAMES AND ADDRESSES OF ATTORNEYS

BOGLE, BOGLE & GATES,
604 Central Building,
Seattle 4, Washington

Attorneys for Appellants.

BASSETT, GEISNESS AND VANCE,
811 New World Life Building,
Seattle 4, Washington

Attorneys for Appellee Basnight.

GEORGE COCHRAN DOUB,
Assistant United States Attorney General

LEAVENWORTH COLBY,
Special Assistant to Attorney General,
Department of Justice, Wasington 25, D. C.

KEITH FERGUSON,
Special Assistant to Attorney General

GRAYDON S. STARING,
Attorney Department of Justice,
United States Post Office and Courthouse,
San Francisco, California.

CHARLES P. MORIARTY,
1012 U. S. Courthouse,
Seattle 4, Washington

Attorney for Appellee U.S.A.

In the United States District Court for the Eastern District of Pennsylvania

Civil Action No. 3791

WILLIE B. BASNIGHT,

vs.

ORION SHIPPING & TRADING COMPANY, INC. PACIFIC CARGO CARRIERS CORPORATION

Action by Seaman Without Prepayment of Costs, 28 U.S.C.A. Sec. 1916

COMPLAINT

Jury Trial Demanded

Plaintiff, Willie B. Basnight, claims of Orion Shipping & Trading Company, Inc., and Pacific Cargo Carriers Corporation, defendants, the sum of Twenty-Five Thousand ($25,000.00) Dollars, with lawful interest thereon, upon a cause of action whereof the following is a true statement:

1. Plaintiff, Willie B. Basnight, at all times mentioned herein, was a seaman in the United States Merchant Marine.

2. Defendants, Orion Shipping & Trading Company, Inc., and Pacific Cargo Carriers Corporation, are corporations duly organized and existing under and by virtue of the laws of the State of Delaware.

3. Plaintiff, upon information and belief, avers

that at all times mentioned herein, defendants possessed, owned, operated and controlled the S.S. "Seacoronet", engaged in coastwise, intercoastal and foreign commerce.

4. On or about the 17th day of August, 1953, and at all times mentioned herein, plaintiff was employed as a member of the crew of the S.S. "Seacoronet" in the capacity of Bedroom Utility at the rate of $242.32 per month, plus overtime, on a foreign voyage for a period not exceeding twelve calendar months.

5. On or about the 17th day of August, 1953, at or about 10:30 p.m., plaintiff, while engaged in the performance of his duties on the vessel at Pusan, Korea, was suddenly and without warning exposed to chlorine gas or other noxious and poisonous fumes and gasses, as a result of which he sustained the injuries which are hereinafter more specifically set forth.

6. Disregarding their duties in the premises, defendants, by their agents, servants and employees, were careless and negligent and the vessel was unseaworthy in:

(a) failing to provide a reasonably safe place for the performance of plaintiff's work;

(b) failing to make a proper and adequate inspection to determine the existence of any unsafe conditions under the circumstances;

(c) causing and permitting the aforesaid chlorine gas or other noxious and poisonous fumes and gasses to escape and affect the plaintiff;

(d) failing to properly and adequately supervise and inspect the stowage of cargo;

(e) failing to warn plaintiff of the escape and presence of said poisonous gasses and to provide adequate safety devices under the circumstances;

(f) failing to provide a safe and seaworthy vessel and appurtenances and keep same in a safe and seaworthy condition;

(g) failing to provide proper and adequate medical and attention and maintenance for the alleviation cure of plaintiff's injuries.

7. During the entire period plaintiff was employed, he well and truly performed all his duties and was obedient to all lawful commands of the master and other officers of the vessel.

8. Solely by reason of the negligence of the defendants and the unseaworthiness of the vessel, plaintiff was then and there generally wounded; his lungs, bronchial tubes and respiratory organs, and the muscles, nerves and ligaments attached thereto were severely wrenched, bruised, torn, fractured and otherwise injured; he sustained a severe paroxysmal cough, hoarseness and dypsnea; he sustained a tracheal bronchitis; he sustained impairment of the vital capacity of his lungs; he sustained a shock to his nervous system; he has suffered excruciating and agonizing aches, pains, mental anguish, shock and disability; he has been unable to assume his usual duties and occupation for a long period of time in the past, and upon information, believes and therefore avers that his condition has become aggravated and that he will be unable to

perform his usual duties for a long period of time in the future; he has in the past and will be in the future be compelled to expend large sums of money for medicine, medical care and treatment.

Wherefore, Willie B. Basnight claims the sum of Twenty-Five Thousand ($25,000.00) Dollars and brings this action to recover same from the defendants.

FREEDMAN, LANDY AND LORRY
/s/ By WILLIAM N. ALPER
Attorneys for Plaintiff

[Endorsed]: Filed September 20, 1954.

In the United States District Court, Western District of Washington, Northern Division

No. 3623

CHARLES E. AREGOOD, Plaintiff,

vs.

ORION SHIPPING AND TRADING COMPANY, a corporation,
Defendant and Third Party Plaintiff,

vs.

UNITED STATES OF AMERICA,
Third Party Defendant.

MOTION TO DISMISS THIRD PARTY COMPLAINT GRANTED

Now on this 6th day of December, 1954, Leonard Ware appears for the Government. Cause comes on

before the Court on motion of third party defendant to dismiss third party complaint under Rule 12(d) FRCD. Cause is called and granted.

Journal No. 48, page 309.

Certification Attached.

United States District Court Western District of Washington, Northern Division

Civil Action No. 3791

WILLIE B. BASNIGHT, Plaintiff,

vs.

ORION SHIPPING & TRADING COMPANY, INC., and PACIFIC CARGO CARRIERS CORPORATION,
Defendants and Third Party Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Third Party Defendant.

THIRD PARTY COMPLAINT

The Orion Shipping and Trading Company, third party plaintiff, complaining of the United States of America, third party defendant, alleges upon information and belief as follows:

I.

That all times hereinafter mentioned the third party plaintiff was and is a foreign corporation organized and existing under the laws of the State

of New York, and at all times herein mentioned was and is doing business within the jurisdiction of this court.

II.

At all times hereinafter mentioned, the United States of America was and is a sovereign power and is sued herein under and by virtue of the provisions of the Federal Tort Claims Act, Title IV, Chapter 753—Public Law 601—Legislative Reorganization Act of 1946, the Suits in Admiralty Act, 46 U.S.C.-A.P. 741—752, and other applicable Federal Statutes.

III.

The plaintiff, Willie B. Basnight, has filed a complaint, copy of which is hereto annexed and marked Exhibit "A", against the defendants and third party plaintiffs, Orion Shipping & Trading Company, Inc., and Pacific Cargo Carriers Corporation, to recover damages for injuries sustained by him on the 17th day of August, 1953, while employed by the defendants and the third party plaintiffs. The complaint alleges that the plaintiffs, Willie B. Basnight, was severely injured while employed aboard the S.S. Seacoronet as a Bedroom Utility.

IV.

That at all times material herein the S.S. Seacoronet was being operated as a merchant vessel of the United States carrying government cargo.

V.

The complaint of the plaintiff, Willie B. Bas-

night alleges that on or about the 17th day of August, 1953 at or about 10:30 P.M., plaintiff, while engaged in the performance of his duties on the vessel at Pusan, Korea, was suddenly and without warning exposed to chlorine gas or other noxious and poisonous fumes and gasses, as a result of which he sustained certain injuries. The complaint further states that disregarding their duties in the premises, defendants, by their agents, servants and employees, were careless and negligent and the vessel was unseaworthy in failing to provide a reasonably safe place for the performance of plaintiff's work, in failing to make a proper and adequate inspection to determine the existence of any unsafe conditions under the circumstances, in causing and permitting the aforesaid chlorine gas or other noxious and poisonous fumes and gasses to escape and affect the plaintiff, in failing to properly and adequately supervise and inspect the stowage of cargo, in failing to warn plaintiff of the escape and presence of said poisonous gasses and to provide adequate safety devices under the circumstances, in failing to provide a safe and seaworthy vessel and appurtenances and to keep same in a safe and seaworthy condition, and in failing to provide proper and adequate medical care and attention and maintenance for the alleviation and cure of plaintiff's injuries. The plaintiff claims that solely by reason of the negligence of the defendants and the unseaworthiness of the vessel, plaintiff was then and there generally wounded; his lungs, bronchial tubes and respira-

tory organs, and the muscles, nerves and ligaments attached thereto were severely wrenched, bruised, torn, fractured and otherwise injured; he sustained a severe paroxysmal cough, hoarseness and dypsnea, he sustained a tracheal bronchitis; he sustained impairment of the vital capacity of his lungs; he sustained a shock to his nervous system; he has suffered excruciating and agonizing aches, pains, mental anguish, shock and disability; he has been unable to assume his usual duties and occupation for a long period of time in the past, and upon information, believes and therefore avers that his condition has become aggravated and that he will be unable to perform his usual duties for a long period of time in the future; he has in the past and will in the future be compelled to expend large sums of money for medicine, medical care and treatment.

VI.

The said injuries of the plaintiff, Willie B. Basnight, were sustained solely and entirely as a result of the negligence of United States of America, the third party defendant, and that, if the defendants and third party plaintiffs, Orion Shipping & Trading Company and Pacific Cargo Carriers Corporation, are held responsible to the plaintiff, Willie B. Basnight, such responsibility arose solely out of the acts and conduct of the third party defendant, United States of America, and/or its agents, servants, or employees, in connection with the loading operations aboard the vessel being conducted at said time and place, and more particularly in the

negligence and carelessness of the third party defendant United States of America in loading aboard the vessel a cylinder or cylinders filled with chlorine gas, and more particularly in treating said cylinders as a part of the scrap metal being loaded aboard the vessel and failing therefore to take the proper precautions to prevent the escape of chlorine gas.

VII.

The third party plaintiff further alleges that the third party defendant, United States of America, was negligent in failing to maintain a proper security watch at or near the scene of its cargo loading operations such that an appropriate alarm could have been given following the release of said chlorine gas in time to warn the members of the crew of the vessel and to prevent their exposure to said chlorine gas fumes.

VIII.

That as a result of the negligence and carelessness of the third party defendant, United States of America, as aforesaid, the third party plaintiffs are entitled to be indemnified for any recovery that may be had against them by Willie B. Basnight, plaintiff, together with expenses if any in this action.

Wherefore, Orion Shipping & Trading Company and Pacific Cargo Carriers Corporation demand judgment against the third party defendant United States of America for all sums that may be adjudged against the defendants Orion Shipping & Trading Company and Pacific Cargo Carriers Cor-

poration in favor of the plaintiff, Willie B. Basnight.

BOGLE, BOGLE & GATES,
Attorneys for Defendants and Third Party Plaintiffs.

Duly Verified.

(Complaint is set out at pages 3-6 of this printed record.)

[Endorsed]: Filed April 11, 1955.

[Title of District Court and Cause No. 3791.]

MOTION TO DISMISS THIRD PARTY COMPLAINT UNDER RULE 12(d) FEDERAL RULES OF CIVIL PROCEDURE

Comes now third party defendant United States of America and moves the Court to dismiss the third party complaint on file herein upon the following grounds:

I.

That the third party complaint fails to state a claim against third party defendant United States of America upon which relief can be granted.

II.

That the Court lacks jurisdiction of third party plaintiff's alleged claim in that the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 et seq., upon which plaintiff's claim is alleged to be founded, does not confer jurisdiction upon this Court, third party plaintiff's alleged claim having arisen in a

foreign country and being therefore a claim excepted from the Federal Tort Claims Act by 28 U.S.C. 2680(k) thereof.

III.

That the Court lacks jurisdiction of third party plaintiff's alleged claim in that the Suits in Admiralty Act, 46 U.S.C. 741 et seq., upon which plaintiff's claim is alleged to be founded, does not confer jurisdiction upon this Court in an action at law.

IV.

That third party plaintiff has failed to allege facts showing that the venue is properly laid in the Western District of Washington.

V.

That third party plaintiff has filed its third party complaint as a civil action on a tort claim against the United States under 28 U.S.C. 1346(d); that third party plaintiff does not reside in the Western District of Washington; that the act complained of did not occur in the said District; and that the venue of the said third party complaint is therefore, under 28 U.S.C. 1402(b), improperly laid in the Western District of Washington.

VI.

That third party plaintiff has filed its third party complaint on a claim against the United States, purportedly under the Suits in Admiralty Act, 46 U.S.C. 741 et seq.; that plaintiff does not reside or have its principal place of business in the Western District of Washington; that the cargo sought to

be charged the liability is not found in the said District; and that the venue of the said third party complaint is therefore, under 46 U.S.C. 742, improperly laid in the Western District of Washington.

VII.

That the third party complaint fails to state any cause of indemnity against third party defendant United States of America and a cause of indemnity, if stated, would be improperly brought under the Federal Tort Claims Act.

/s/ CHARLES P. MORIARTY,
United States Attorney,
/s/ FRANK N. CUSHMAN,
Assistant United States Attorney,
/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General,
Attorneys for Third Party Defendant

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed June 15, 1955.

[Title of District Court and Cause No. 3791.]

AFFIDAVIT OF KEITH R. FERGUSON

United States of America
Northern District of California—ss.

Keith R. Ferguson being duly sworn, upon oath deposes and says:

That he is one of the attorneys for third party de-

fendant United States of America in this case, and as such states on the basis of information officially furnished to him,

That the attached photostatic copy of the Certificate of Second Lieutenant Robert E. Baynard, United States Army, photostatic copy of the Army Ocean Manifest and photostatic copies of two Army shipping documents, are true copies of original documents in the files of the United States Army, indicating that the chlorine flasks referred to in the third party complaint herein were loaded aboard the SS. Sea Coronet at Pusan, Korea for shipment as scrap metal to Yokohama, Japan, and that the said chlorine flasks and all of them were duly received and discharged at Yokohama, Japan.

/s/ KEITH R. FERGUSON

Subscribed and sworn to before me this 10th day of June, 1955.

[Seal] /s/ E. H. NORMAN,

Deputy Clerk of the District Court, Northern District of California.

Acknowledgment of Service Attached.

EXHIBIT "Y"

Headquarters
7th Transportation Major Port
Port Transportation Division
APO 59

CERTIFICATE

I, Robert E. Baynard, 2/Lt QMC, have been associated with the Documentation Section, Port Trans-

portation Division, 7th Transportation Major Port since 10 July 1953 and have personal knowledge of the enclosed documents.

Attached hereto are extract true copies of the Army Ocean Manifests and Army Shipping Documents relating to the gas tanks loaded aboard the SS Sea Coronet on 18 August, 1953 at Quay 2, Berth 13, at this port. The "Pier Operations" Section of the Army Shipping Documents have the names of the Korean checkers who received and tallied aboard this cargo. The ASD's were prepared by the Documentation Section from the outbound hatch tallies.

The outturn report from the 2nd Transportation Major Port makes no mention of these gas tanks which indicates they were received as manifested. Port records do not indicate whether subject tanks arrived in the same or different rail shipments.

/s/ Robert E. Baynard,
2/Lt QMC
OIC, Documentation Section

[Endorsed]: Filed June 15, 1955.

VOYAGE P-604 RESTRICTED ARMY OCEAN MANIFEST SECURITY INFORMATION

VESSEL	FROM	TO	LOADED AT	SERVICE AND CLASS	PAGE
M/S SEA CROWEST	I S U P	E V I L	QUAY #2 BERTH #13	IND. CON.	1

BOAT REFERENCE NO.	ITEM NO.	CONSIGNEE	QUANTITY AND TYPE PKGS.	DESCRIPTION	WEIGHT	CUBE	REMARKS
6611-A	C1840	MAINTENANCE DIVISION CLASSIFICATION BRANCH J-114-DATA-TRIED AREA #4 SUNKO STATION	18 EA	GAS TANK	37000	594.0	5 L/H
	C1846	YOKOHAMA ENGINEER DEPOT	4 Pcs	GAS TANK	6000	128.0	4 L/H
			373 Pcs	Total Wt and Cu	292161	16587.4	
				Total Lt and Mt	130.4	444.7	

A: TRUE EXTRACT COPY
Robert Baynard
ROBERT E. BAYNARD
2ND LT QMC

(73)

Exhibit Y
(continued)

(74)

Date shipped	Car initial and no.	Seal nos.	B/L no.	Carrier

6611-A

Stock No.	Description of Article	Unit of Meas.	Number of Pkgs.	Type of Pkg.	Package Nos.	Unit Wt.	Total Weight	Unit Cube	Total Cube	Req. Line Item No.	Ship. Ord.	Tally Quantity Actually Shipped
1												
2												
3	GAS TANK- 4 L/H		5	Ea	1500		7500	33.0	165.0			
4	GAS TANK- 5 L/H		13	Ea	1500		19500	33.0	429.0			
5												
6							ALL SALVAGE					
7												

18	Ea	TA [illegible]			37200	514.0
22	Total			Totals	46722	1030.9

A TRUE EXTRACT COPY
[signature]
ROBERT E. GAYNARD
2ND LT QMC

Packages shown in column headed "Total Pkgs." were received in apparent good condition except as noted

Port Transportation
Tally No.
Date
Location
Rec'd by

Intransit Storage
Tally No.
Date
Location
Rec'd by

Pier Operations
Rec'd by: KIM KI JONG
Date: 16-AUG.-53
Pier Location: QUAY #2 B-13
Date Loaded: 18-AUG.-53
Hatch Checker: KIM [illegible]
Transport: S/S [illegible] CORNET
Hatch: [illegible]
Manifest Item Nos.
Permit No.: [illegible]-1840

DA FORM 1 MAR 49 450-5-D

Exhibit Y
(continued)

(75)

552ND ENGINEER BASE DEPOT
APO 973

YOKOHAMA ENGINEER DEPOT

6611-A

L/T 2.7 M/T 3.2

GAS TANK	4	Pce	1500	6000	32	128			4
				ALL SALVAGE					

Summary line: 4 | Pce | GAS TANK | 6000 | 128

Totals: 4 | 6000 | 128

A CERTIFIED TRUE COPY
Robert E. Baynard
ROBERT E. BAYNARD
2ND LT QMC

Chung Lak Kyon
19th Aug '53
OM-2 B/13
19 Aug. '53
Chung Lak Kyon
S/S SEA CORONET
H&L L/H
C-1846

DA FORM 450-5-D

Exhibit Y
(continued)

[Title of District Court and Cause No. 3623.]

ORDER ON THIRD PARTY DEFENDANT'S MOTION TO DISMISS THIRD PARTY COMPLAINT UNDER RULE 12(d)

The third party defendant's motion to dismiss the third party complaint under Rule 12 (d) having come on regularly for hearing on the 19th day of September, 1955, and

The defendant and third party plaintiff's motion to file an amended third party complaint having previously thereto been granted, and

The court having considered the thirty party defendant's motion to dismiss as also being one against the amended third party complaint, and

The plaintiff being represented by Mr. Edwin J. Friedman, the defendant being represented by Mr. Robert V. Holland and the third party defendant being represented by Mr. Frank Cushman, and Graydon Staring, and the court having heard argument of counsel and being fully advised in the premises; now, therefore

It Is Hereby Ordered, Adjudged and Decreed that the third party defendant's motion to dismiss third party complaint and amendment thereto be and the same hereby is denied.

It Is Further Ordered that the third party defendant is given leave on the trial of the cause to renew said motion.

Done In Open Court this 6th day of October, 1955.

/s/ JOHN C. BOWEN
U. S. District Judge

Presented and approved by:
/s/ ROBERT V. HOLLAND
Of Bogle, Bogle & Gates, Attorneys for Defendant and Third Party Plaintiff.

Approved:
/s/ EDWIN J. FRIEDMAN
Of Levinson & Friedman
Attorneys for Plaintiff

Approved:
/s/ F. N. CUSHMAN
Assistant United State Attorney

[Endorsed]: Filed Oct. 6, 1955.

[Title of District Court and Cause No. 3791.]

ANSWER TO THIRD PARTY COMPLAINT

Comes now third party defendant United States of America and answering unto the third party complaint, admits, denies and alleges as follows:

I.

Answering unto Paragraph I, third party defendant admits that Orion Shipping and Trading Company was and is a corporation organized and existing under the laws of the State of New York and denies all and singular the remaining allegations thereof.

II.

Answering unto Paragraph II, third party defendant admits that it is a sovereign power. The remaining allegations of Paragraph II concern questions of law and do not require any answer of third party defendant.

III.

Answering unto Paragraph III, third party defendant admits the allegations thereof.

IV.

Answering unto Paragraph IV, third party defendant admits the allegations thereof.

V.

Answering unto Paragraph V, third party defendant admits the allegations thereof except the allegations of the complaint described therein, as to which no answer by third party defendant is required.

VI.

Answering unto Paragraph VI, third party defendant denies all and singular the allegations thereof.

VII.

Answering unto Paragraph VII, third party defendant denies all and singular the allegations thereof.

VIII.

Answering unto Paragraph VIII, third party defendant denies all and singular the allegations thereof.

Wherefore, third party defendant prays that the third party complaint herein be dismissed and judgment entered for the United States of America with costs.

/s/ CHARLES P. MORIARTY
United States Attorney
/s/ FRANK N. CUSHMAN
Assistant United States Attorney
/s/ KEITH R. FERGUSON
Special Assistant to the Attorney General
/s/ GRAYDON S. STARING
Attorney, Department of Justice
Attorneys for Third Party Defendant United States of America

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 7, 1955.

[Title of District Court and Cause No. 3791.]

ANSWER

Comes now the defendants and for answer to the complaint of the plaintiff on file herein admit, deny and allege as follows:

I.

Answering Paragraph I, defendants admit the same.

II.

Answering Paragraph 2, defendants deny the same.

III.

Answering Paragraph 3, defendants admit the same.

IV.

Answering Paragraph 4, defendants admit the same.

V.

Answering Paragraph 5, defendants admit the escape of gas on the vessel at the time and place mentioned. Defendants deny each and every other allegation therein contained.

VI.

Answering Paragraph 6, defendants deny the same.

VII.

Answering Paragraph 7, defendants deny the same.

VIII.

Answering Paragraph 8, defendants deny the same.

Wherefore, having fully answered the complaint of the plaintiff, defendants pray that they may be dismissed and recover their costs and disbursements herein to be taxed.

BOGLE, BOGLE & GATES,
Attorneys for Defendants.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 13, 1956.

[Title of District Court and Cause No. 3791.]

REQUEST FOR ADMISSION OF FACTS AND GENUINENESS OF DOCUMENTS

To: Orion Shipping and Trading Company, Inc. and Bogle, Bogle and Gates and Robert V. Holland, Esquire, its attorneys:

Please Take Notice that third party defendant hereby requests third party plaintiff, pursuant to Rule 36 and Rule 37 (c) of the Federal Rules of Civil Procedure to admit within 10 days after service of this request, the genuineness of the following documents:

I.

The photostatic copy of the Certificate of Second Lieutenant Robert E. Baynard, United States Army, which is attached to the Affidavit of Keith R. Ferguson filed herein June 15, 1955 and heretofore served upon you.

II.

The photostatic copy of the Army Ocean Manifest which is attached to the Affidavit of Keith R. Ferguson filed herein June 15, 1955 and heretofore served upon you.

III.

The photostatic copies of two Army Shipping Documents which are attached to the Affidavit of Keith R. Ferguson filed herein June 15, 1955 and heretofore served upon you.

Thirty Party Defendant further requests third party plaintiff to admit within the said period the truth of the following facts:

IV.

Second Lieutenant Robert E. Baynard, United States Army, was, on August 16, 1953 and at all material times thereafter, associated with the Documentation Section, Port Transportation Division, 7th Transportation Major Port at Pusan, Korea.

V.

Second Lieutenant Robert E. Baynard has personal knowledge of the original documents of which photostatic copies are referred to in II and III above.

VI.

The 22 gas tanks listed in the documents referred to in II and III above included all chlorine flasks loaded aboard the Sea Coronet at Pusan on or about August 17, 1953.

VII.

All the chlorine flasks loaded aboard the Sea Coronet at Pusan on or about August 17, 1953 were consigned to Yokohama or other points in Japan and were discharged by the Sea Coronet at Yokohama or other points in Japan.

VIII.

None of the chlorine flasks loaded aboard the Sea Coronet at Pusan on or about August 17, 1953 was carried to or discharged in the United States by the Sea Coronet.

IX.

None of the chlorine flasks loaded aboard the Sea Coronet at Pusan on or about August 17, 1953 was

at the time the third party complaint was filed herein, or has been since, located in the Western District of Washington.

X.

Orion Shipping and Trading Company, Inc. does not reside in the Western District of Washington.

XI.

Orion Shipping and Trading Company, Inc. does not have its principal place of business in the Western District of Washington.

Third Party Defendant further requests third party plaintiff to admit within the said period the genuineness of the following document:

XII.

Copy of "Notice of Damage to Vessel" dated 17 August 1953 and signed by the master of the SS Sea Coronet, attached hereto marked "Exhibit A".

/s/ CHARLES P. MORIARTY,
United States Attorney

/s/ F. N. CUSHMAN,
Assistant United States Attorney

/s/ KEITH A. FERGUSON,
Special Assistant to the Attorney General

/s/ GRAYDON S. STARING,
Attorney, Department of Justice

Attorneys for Third Party Defendant United States of America

Acknowledgment of Service Attached.

EXHIBIT A

Orion Shipping & Trading Co., Inc.
80 Broad Street, New York 4, N. Y.

Report No. 31

Notice of Damage to Vessel While Under Charter to Military Sea Transportation Service

SS. Sea Coronet. Voy. #7. Port: Pusan.
Owner/Operator: Orion Shipping & Trading Co.

Date: 17 August, 1953.
Contract No. MST 1102.

a. This notice is to be signed by the Master.

b. Prior to departure this port, mail to Commander, Military Sea Transportation Service, Washington, D. C. Attn: Code 34.

c. If after diligent inquiry the name of the Contractor, agent or employee causing the damage is unknown, state "unknown". Korean Heavy Lift Corp.

1. Date of Damage: 17 August, 1953.

2. Port: Pusan.

3. Particulars of Damage. Carefully identify area, extent, frame Nos., etc. State your opinion of probable cause, reasons, etc. Indicate whether vessel incapacitated and to what degree. A complete statement is requested; use additional sheets and photographs where required. At 2230 this date one cylinder of Chlorine Gas was loaded on board this vessel. Cylinder was supposed to be empty. When lowered into No. 5 L. H. the gas escaped enveloping the entire vessel, causing evacuation order to be

given by order of the Master. Ship's plant secured. Damage not estimated at this time. See attached report.

4. Name of concern, person, etc., causing damage; also indicate name and address of person in charge of any work gangs concerned. Korean Heavy Lift Corp.

5. Witnesses (if none, state none). Seaman's Book No. or other identification: Z477999 D1. Name and address: Rudolph A. Henderson, Third Mate, 806 Center Dr., Baldwin Oaks, Baldwin, L. I.

6. Name of Chief Officer: Arthur G. Morriss. License No. 46281. Address: 2819 N.E. 69th Avenue, Portland 13, Oregon.

7. Did an MSTS representative inspect the damage? If so, give his name and title. Was nearest MSTS representative notified? Yes. Four copies this report delivered to MSTS Pusan. Received notice: /s/ R. V. Hallowell, Ens., USNR.

I hereby certify that the information set out in the above Notice of Damage is correct to the best of my knowledge and belief.

N. Miller, Master.

[Endorsed]: Filed April 20, 1956.

[Title of District Court and Cause No. 3791.]

VERDICT FOR PLAINTIFFS

We, the jury in the above-entitled cause, find for the Plaintiff and assess Plaintiff's amount of recovery in the sum of Seven Thousand Nine Hundred and No/100 Dollars ($7,900.00).

/s/ HAROLD J. CREEVEY,
Foreman

Entered judgment on verdict in Civil Docket June 4, 1956.

[Endorsed]: Filed June 1, 1956.

In the District Court of the United States, Western District of Washington, Northern Division

No. 3791

WILLIE B. BASNIGHT, Plaintiff,

vs.

ORION SHIPPING & TRADING COMPANY, INC., and PACIFIC CARGO CARRIERS CORPORATION,

Defendants and
Third Party Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Third Party Defendant.

JUDGMENT

This Matter having come on for trial the 23rd

day of May, 1956, plaintiff Willie B. Basnight appearing in person and by his attorneys, Bassett, Geisness & Vance, J. Duane Vance of counsel; defendants Orion Shipping & Trading Company, Inc. and Pacific Cargo Carriers Corporation appearing by their attorneys, Bogle, Bogle & Gates, Robert V. Holland of counsel; third party defendant, United States of America, appearing by the United States Attorney Charles P. Moriarty, Graydon Staring and Frank Cushman of counsel; a jury having been duly impaneled and sworn; witnesses having been sworn and heard; argument of counsel having been heard; and the matter having been submitted to the jury and the jury having returned its verdict in favor of the plaintiff on the 1st day of June, 1956, which was entered on the civil docket on June 4, 1956 and on the judgment docket on June 4, 1956, and the motions of the defendants Orion Shipping & Trading Company, Inc. and Pacific Cargo Carriers Corporation for Judgment N.O.V. or for a new trial having been denied; now, therefore, in accordance therewith.

It is hereby ordered, adjudged and decreed that the plaintiff Willie B. Basnight have judgment against the defendants Orion Shipping & Trading Company, Inc., a corporation, and Pacific Cargo Carriers Corporation in the sum of $7,900.00, effective as of June 4, 1956.

It is further ordered, adjudged and decreed that all of the foregoing shall bear interest at the legal rate from June 4, 1956.

It is further ordered, adjudged and decreed that

the plaintiff, Willie B. Basnight, have and recover his costs herein.

To all of which defendants except and their exceptions are hereby allowed.

Done in open court this 20th day of June, 1956.

/s/ JOHN C. BOWEN,
United States District Judge

Presented by and Approved:
BASSETT, GEISNESS & VANCE,
Attorneys for Plaintiff

Approved as to form:
BOGLE, BOGLE & GATES,
Attorneys for Defendants Orion Shipping & Trading Company, Inc. and Pacific Cargo Carriers Corporation

Copy received and notice of presentation waived:
/s/ F. N. CUSHMAN,
Assistant United States Attorney

[Endorsed]: Filed and entered June 20, 1956.

[Title of District Court and Cause No. 3791.]

NOTICE OF APPEAL

Notice is hereby given that Orion Shipping & Trading Company, Inc. and Pacific Cargo Carriers Corporation, defendants above named, hereby appeal to the United States Court of Appeals for the

Ninth Circuit from the final judgment entered in this action on June 20, 1956.

BOGLE, BOGLE & GATES,

Attorneys for Appellants, Orion Shipping & Trading Company, Inc. and Pacific Cargo Carriers Corporation.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 17, 1956.

United States District Court, Western District of Washington, Northern Division

No. 3792—Arthur G. B. Morriss, Plaintiff,
No. 3791—Willie B. Basnight, Plaintiff,
No. 3623—Charles E. Aregood, Plaintiff,
No. 3617—Willie B. Holmes, Plaintiff,
No. 3624—George E. Lewis, Plaintiff,
No. 3728—Joseph E. Mitchell, Plaintiff,
No. 3793—Ben Wilcox, Plaintiff,

vs.

Orion Shipping & Trading Company, Inc., and Pacific Cargo Carriers Corporation,
Defendants and
Third Party Plaintiffs,

vs.

United States of America,
Third Party Defendant.

ORDER OF DISMISSAL

Third party plaintiffs' complaints over against third party defendant coming on regularly for

hearing before the above-entitled court July 27, 1956, the parties being represented by counsel and further proof being offered by third party plaintiffs and the matters being fully argued and it appearing to the Court that jurisdiction of the third party actions herein is exclusively under the Suits in Admiralty Act and it further appearing that third party plaintiffs have failed to prove proper venue under the Suits in Admiral Act, now, therefore, it is hereby

Ordered that the third party complaints and amended third party complaints in each of the above-entitled actions shall be and hereby are dismissed without prejudice and without costs to either party.

Done in open court this 27th day of July, 1956.

JOHN C. BOWEN,
United States District Judge

Presented and approved by:
F. N. CUSHMAN
GRAYDON S. STARING
Attorneys for third party defendant

[Endorsed]: Filed July 27, 1956.

[Title of District Court and Causes Nos. 3792, 3791, 3623, 3617, 3624, 3728 and 3793.]

MOTION FOR RECONSIDERATION

Comes now the defendants Orion Shipping & Trading Co., Inc. and Pacific Cargo Carriers Corporation and moves this Honorable Court for a

reconsideration of its order and decree of dismissal in the third party action entered on July 27, 1956.

This motion is filed under Rule 59 (e) of the Federal Rules of Civil Procedure and upon the ground that proper venue and jurisdiction in the third party plaintiffs' cause of action against the third party defendant, United States of America has been properly established without allegation or proof thereof under the doctrine of ancillary venue as set forth by the Tenth Circuit in United States v. Acord, 209 F. (2d) 709, portions of which decision are set forth at length in the defendants' memorandum of authorities filed on April 16, 1955.

BOGLE, BOGLE & GATES,
Attorneys for Defendants and
Third Party Plaintiffs

Acknowledgment of Service Attached.

[Endorsed]: Filed August 3, 1956.

[Title of District Court and Causes Nos. 3792, 3791, 3623, 3617, 3624, 3728 and 3793.]

MOTION TO VACATE DECREE OF DISMISSAL AND FOR AN ORDER TRANSFERRING THE THIRD PARTY CAUSE OF ACTION TO THE SOUTHERN DISTRICT OF NEW YORK

Comes now the defendants, Orion Shipping & Trading Company, Inc. and Pacific Cargo Carriers Corporation in the above entitled causes, and moves this Honorable Court for an order vacating the

decree of dismissal entered on the 27th day of July, 1956 and transferring the third party cause of action against United States of America in each of the above entitled causes to the Southern District of New York.

This motion is made under Rule 59 (e) of the Federal Rules of Civil Procedure and upon the ground that said transfer may be made pursuant to §1406 (a) of Title 28, United States Code Annotated wherein such transfer is permitted if it is "in the interest of justice". This motion is based upon the further ground that said transfer is in the interest of justice since an attempted recovery over by the defendants against the United States of America in a new action instituted in the Southern District of New York would be time barred under the ruling of the Second Circuit in Ryan Stevedoring v. United States of America, (C. A. 2d, June 6, 1949) 175 F. (2d) 490, 1949 A. M. C. 1363.

BOGLE, BOGLE & GATES,
Attorneys for Defendants and
Third Party Plaintiffs

[Endorsed]: Filed August 3, 1956.

[Title of District Court and Causes Nos. 3623, 3617, 3624, 3728, 3791, 3792, 3793.]

ORDER DENYING THIRD PARTY PLAINTIFFS' MOTION FOR RECONSIDERATION AND DENYING THIRD PARTY PLAINTIFFS' MOTION TO VACATE DECREE OF DISMISSAL AND FOR AN ORDER TRANSFERRING THE THIRD PARTY CAUSE OF ACTION TO THE SOUTHERN DISTRICT OF NEW YORK

Third Party Plaintiffs' motion for reconsideration and motion to vacate decree of dismissal and for an order transferring the Third Party cause of action to the Southern District of New York coming on regularly for hearing before the above-entitled court August 20, 1956, the parties being represented by counsel and the matter being fully argued, it is hereby

Ordered that the said motion for reconsideration and the said motion to vacate decree of dismissal and for an order transferring the third party cause of action to the Southern District of New York shall be and hereby are denied.

Done in open court this 20th day of August, 1956.

JOHN C. BOWEN,
United States District Judge

Presented and approved by:
GRAYDON S. STARING,
Attorney for Third Party Defendant

Approved as to form:
BOGLE, BOGLE & GATES,
ROBERT V. HOLLAND,
Attorneys for Third Party Plaintiffs

[Endorsed]: Filed August 20, 1956.

[Title of District Court and Cause No. 3791.]

NOTICE OF APPEAL

Notice is hereby given that Orion Shipping & Trading Company and Pacific Cargo Carriers Corporation, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment in the third party action against the United States of America entered on July 27, 1956.

The defendants also appeal from the Order Denying Third Party Plaintiffs' Motion for Reconsideration and Denying Third Party Plaintiffs' Motion to Vacate Decree of Dismissal and for an Order Transferring the Third Party Cause of Action to the Southern District of New York, entered on August 20, 1956.

BOGLE, BOGLE & GATES,
Attorneys for Defendants and
Third Party Plaintiffs

[Endorsed]: Filed September 7, 1956.

[Title of District Court and Cause No. 3791.]

AMENDED COST BOND ON APPEAL

That we, Orion Shipping & Trading Company, Inc., and Pacific Cargo Carriers Corporation as principal, and National Surety Corporation, as surety, are held and firmly bound unto Willie B. Basnight and United States of America in the full and just sum of Two Hundred Fifty ($250.00) Dollars, to be paid to the said Willie B. Basnight, his successors, executors, administrators, and assigns, and to the United States of America; to which payment, well and truly to be made, we bind ourselves, our successors, assigns, heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 5th day of September, 1956.

Whereas, on June 8, 1956, in an action pending in the United States District Court for the Western District of Washington, Northern Division, between Willie B. Basnight as plaintiff and Orion Shipping & Trading Company, Inc. and Pacific Cargo Carriers Corporation as defendants, a judgment was rendered against the said defendants and the said defendants having filed a notice of appeal from such judgment to the United States Court of Appeals for the Ninth Circuit; and

Whereas, on July 27, 1956 in the third party action with Orion Shipping & Trading Company and Pacific Cargo Carriers Corporation as third party plaintiffs and the United States of America as third

party defendants, a judgment was rendered for United States of America, third party defendant, and against Orion Shipping & Trading Company, Inc. and Pacific Cargo Carriers Corporation, third party plaintiffs and the said third party plaintiffs having filed a notice of appeal from said judgment to the United States Court of Appeals for the Ninth Circuit;

Now, therefore, the condition of this obligation is such, that if the said defendants and third party plaintiffs shall prosecute their appeals to effect and shall pay costs if the appeals are dismissed or the judgments affirmed, or such costs as the said Court of Appeals may award against the said defendants if the judgments are modified, then this obligation to be void; otherwise to remain in full force and effect.

ORION SHIPPING & TRADING COMPANY, INC., and PACIFIC CARGO CARRIERS CORPORATION,

By BOGLE, BOGLE & GATES,
Their Attorneys,
Principals

NATIONAL SURETY CORPORATION,

[Seal] /s/ By (Illegible),
Attorney-in-Fact,
Surety

[Endorsed]: Filed September 7, 1956.

[Title of District Court and Cause No. 3791.]

DOCKET ENTRIES

* * * * *

1956

Apr. 20—Filed third party defendant's request for admissions. (30)

Apr. 23—Ent. order continuing all motions to 4-30-56 at 10 a.m.

Apr. 30—Ent. order denying deft's motion to produce, counsel having made an arrangement.

* * * * *

[Title of District Court and Cause No. 3623.]

DOCKET ENTRIES

* * * * *

1954

Dec. 6—Ent. record of hearing on motion to dismiss third party complaint. Granted.

Dec. 29—Filed Motion to Transfer cause to Calendar of Judge John C. Bowen. (22)

" —Filed Petition to vacate order granting Third Party Deft.'s Motion to Dismiss Third Party Complaint. (23)

" —Filed Note for hearing above motion on January 3, 1955. (24)

Dec. 30—Filed Notice for hearing Motion to Transfer cause to Judge Bowen, on January 3, 1954. (25)

1955

Jan. 3—Motion to transfer cause to Judge Bowen called and granted subject to his approval.

1955

Jan. 3—Petition of deft. and third party pltff. to vacate order granting motion to dismiss third party complaint called and granted.

" —Filed Amended Order of defendant's motion to elect. (26)

" —Judge Bowen accepts transfer of this case.

Jan. 7—Filed Order vacating previous order granting motion to dismiss third party complaint.

" —Filed Order transferring cause to Judge Bowen.

Jan. 12—Filed Answer of deft. and third party pltff.

Jan. 21—Filed Second Amended Complaint and demand for jury.

Jan. 25—Filed Stipulation re second amended complaint.

* * * * *

[Title of District Court and Cause No. 3791.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United

States Court of Appeals for the Ninth Circuit and Rule 75 (o) of the Federal Rules of Civil Procedure, I am transmitting herewith, the following original papers in the file dealing with the action, as the record on appeal herein to the United States Court of Appeals at San Francisco, to-wit:

1. Complaint, filed September 20, 1954.
2. Marshal's return on summons, filed September 20, 1954.
3. Interrogatories Addressed to Plaintiff by the Defendants, filed September 20, 1954.
4. Notice of Defendants to take deposition of Plaintiff, filed September 20, 1954.
5. Appearance of Krusen, Evans and Shaw as attorneys for Defendants, filed September 20, 1954.
6. Motion of Defendants to Transfer, filed September 20, 1954.
7. Order Granting Defendants' Motion to Transfer, filed September 20, 1954.
8. Appearance of Bassett, Geisness and Vance as attorneys for Plaintiff, filed October 14, 1954.
9. Motion of Defendants to Elect, filed January 13, 1955.
10. Appearance of Bogle, Bogle and Gates as attorneys for Defendants, filed January 13, 1955.
11. Motion of Defendants to Bring in Third Party Defendant and Order granting same, filed April 11, 1955.
12. Notice of Defendants and Third Party Plaintiffs to hear Motion to Bring in Third Party Defendant, filed April 6, 1955.
13. Third Party Complaint, filed April 11, 1955.

14. Praecipe, summons to Third Party Defendant U. S., filed April 12, 1955.

15. Marshal's return on summons, Third Party Defendant U. S., filed April 15, 1955.

16. Motion of Third Party Defendant U. S. to Dismiss Third Party Complaint, filed June 15, 1955.

17. Memorandum of Third Party Defendant of Points and Authorities in Support of Motion to Dismiss Third Party Complaint, filed June 15, 1955.

18. Affidavit of Keith R. Ferguson, filed June 15, 1955.

19. Motion of Defendants and Third Party Plaintiff to Consolidate, filed September 14, 1955.

20. Notice of Defendants and Third Party Plaintiffs to hear Motion to Elect and Motion to Consolidate, filed September 14, 1955.

21. Order Granting Defendants' Motion to Elect, filed October 6, 1955.

22. Answer of Third Party Defendant to Third Party Complaint, filed October 7, 1955.

23. Stipulation and Order Re Motion to Consolidate, filed April 9, 1956.

24. Interrogatories Propounded to Third Party Defendant by Defendant and Third Party Plaintiff, filed April 11, 1956.

25. Motion of Defendant and Third Party Plaintiff, Orion Shipping and Trading Company to Produce, filed April 11, 1956.

26. Motion of Defendant and Third Party Plaintiff Orion Shipping and Trading Company to Sever Third Party Claim, filed April 11, 1956.

27. Notice of Defendants and Third Party Plain-

tiffs to hear Motion to Produce and Motion to Sever Third Party Claim, filed April 11, 1956.

28. Notice of Defendants and Third Party Plaintiffs to take depositions of Willie B. Basnight and Arthur G. B. Morriss, filed April 12, 1956.

29. Answer of Defendants, filed April 13, 1956.

30. Request of Third Party Defendant for Admission of Facts and Genuineness of Documents, filed April 20, 1956.

31. Deposition of Dr. Gordon L. Maurice, filed May 7, 1956.

32. Deposition of Willie B. Basnight, filed May 16, 1956.

33. Order Granting Defendants and Third Party Plaintiffs' Motion to Sever, filed May 22, 1956.

34. Trial Memorandum of Plaintiffs, filed May 23, 1956.

35. Verdict for Plaintiff, filed June 1, 1956.

36. Order Denying Motion of Defendants for Judgment N.O.V., or in the Alternative for a New Trial, filed June 18, 1956.

37. Statement of Costs and Disbursements to be Taxed Against Defendants, filed June 20, 1956.

38. Judgment, filed June 20, 1956.

39. Notice of Appeal by Defendants, filed July 17, 1956.

40. Cost Bond on Appeal, filed July 17, 1956.

41. Copy of Order of Dismissal of Third Party Complaint, filed July 27, 1956.

42. Order (Copy) Denying Third Party Plaintiffs' Motion for Reconsideration, etc., filed August 20, 1956.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred by my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to-wit: Filing fee, Notice of Appeal, $5.00; and that said amount has been paid to me by the attorneys for the appellant.

Witness my hand and official seal at Seattle this 21st day of August, 1956.

[Seal] MILLARD P. THOMAS,
Clerk

/s/ By TRUMAN EGGER,
Chief Deputy

[Title of District Court and Causes Nos. 3623, 3792, 3791, 3617, 3624, 3728, 3793.]

TRANSCRIPT OF PROCEEDINGS

Be it remembered, that the above entitled and numbered causes were consolidated for trial and heard before the Honorable John C. Bowen, one of the Judges of the above entitled Court, and a jury, beginning Wednesday, May 23, 1956, at 10:00 o'clock a.m. [1]*

Plaintiffs Aregood and Mitchell were represented by Mr. Edwin J. Friedman, of Messrs. Levinson & Friedman, Attorneys at Law.

Plaintiffs Morriss, Basnight and Wilcox were represented by Mr. J. Duane Vance, of Messrs. Bassett, Geisness & Vance, Attorneys at Law.

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* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

Plaintiffs Holmes and Lewis were represented by Mr. John D. Spellman, of Messrs. Kane & Spellman, Attorneys at Law.

Defendants and Third Party Plaintiffs were represented by Mr. Robert V. Holland, of Messrs. Bogle, Bogle & Gates, Attorneys at Law.

The Third Party Defendant was represented by Mr. Graydon S. Staring, Attorney, Department of Justice, and Mr. Francis N. Cushman, Assistant United States Attorney.

Whereupon, the following proceedings herein were had and done, to-wit:

The Court: In the following cases, Cause No. 3623, entitled Charles E. Aregood vs. Orion Shipping and Trading Co., defendant, and later named as third party plaintiff in a proceeding over against the United States as a third party defendant; also [2] Cause No. 3728, entitled Joseph E. Mitchell vs. Orion Shipping and Trading Co., defendant and third party plaintiff, and against the United States of America as third party defendant; also Cause No. 3617, entitled Willie B. Holmes vs. Orion Shipping and Trading Company, defendant and third party plaintiff, against the United States of America as a third party defendant; also Cause No. 3624, entitled George E. Lewis vs. Orion Shipping and Trading Company, defendant and third party plaintiff, against the United States of America as a third party defendant; also Cause No. 3791, entitled Willie B. Basnight vs. Orion Shipping and Trading Company, defendant and third party plaintiff, against the United States of America as third party

defendant; also Cause No. 3792, entitled Arthur G. B. Morriss vs. Orion Shipping and Trading Company, defendant and third party plaintiff, against the United States of America as third party defendant, and also Cause No. 3793, entitled Ben Wilcox vs. Orion Shipping and Trading Company, defendant and third party plaintiff, against the United States of America as a third party defendant, all of which cases just identified by the Court have been and are now consolidated for trial, are the parties and Counsel ready to proceed with the trial of each and all of those consolidated [3] actions just identified by the Court?

Mr. Vance: We are, your Honor.

The Court: Are the plaintiffs all ready?

Mr. Friedman: Yes, your Honor.

Mr. Spellman: Yes, your Honor.

Mr. Vance: We are, your Honor.

The Court: Are the defendants all ready?

Mr. Holland: Yes, your Honor.

Mr. Staring: If your Honor please, the United States, as your Honor knows, reserves the objections as heretofore made to this trial on the grounds of jurisdiction and otherwise. For that reason I cannot say that the government is ready to try the case in the sense that it would be if we did not make those objections. The government is present and will remain present to protect its record in the event of an adverse ruling.

The Court: The Court overrules the objection stated by Counsel for the United States of America. The Court states, and I ask Counsel to make a cor-

rective statement if the Court's statement now about to be made is incorrect, the trial of these actions before the jury asked to be in attendance today and some of whom will be empaneled as the jury to try these consolidated cases are for trial as between the plaintiff and the defendant, [4] namely, the plaintiff in each case, the first one named being the Aregood case against Orion Shipping and Trading Company, defendant. So far as the United States of America is concerned, there is no trial before this jury. The evidence will be received and will be considered by the Court as the fact trier later so far as the United States of America is concerned in a final trial proceeding and not before a jury, this jury or any other.

Mr. Vance: If your Honor please, I would like to call your attention to the fact that in the three cases in which I appear, 3791, 3792 and 3793, the Pacific Cargo Carriers Corporation is likewise a defendant.

The Court: Then let the record show that correction. I wish to know if Counsel know of any inaccuracy in the Court's statement about the United States of America not being on trial before this jury to be empaneled here today. Does any plaintiff ask the jury to be empaneled to try these consolidated cases to make any finding for or against the United States of America?

Mr. Vance: No, your Honor.

Mr. Friedman: No, your Honor. However, I think the jury should be advised—— [5]

The Court: In so far as there may be any lia-

bility over in respect to the third party action against the United States of America, that is a matter which may depend in part upon the outcome of this action before this jury to be empaneled here today.

Mr. Friedman: That is correct, your Honor.

The Court: But as to what it is or as to whether there is such liability against the United States and, if so, how much, is not before and will not be before this jury to be empaneled here today to try these cases. Is that correct?

Mr. Friedman: That is correct, and I think further the jury should be advised that the Court during the course of this trial is considering the liability of the United States of America so that they should know.

The Court: All of the jurors and all parties to this action are so advised, that the Court is the fact trier so far as the actions over against the third party defendant United States of America is concerned, the Court is the trier of the fact and will be trying the case against the United States of America only in so far as the evidence concerns the issues between any and all other parties and the United States of America. This jury will not be required to pass upon any question that [6] concerns the United States of America in respect to granting any relief at the hands of this jury against the United States of America.

Mr. Staring: If your Honor please, there is one matter which is related to your Honor's statement which I would like to clear up. The government

considers that it has as against the plaintiffs in their case being presented to this jury all objections to evidence which defendant Orion Shipping and Trading Company would have.

The Court: Let the record show Counsel's statement, and the objection is overruled. Is there any other statement so far as identification of these cases to be tried before this jury and in so far as the issues are concerned and in so far as the identity of the parties litigant is concerned?

Mr. Friedman: If the Court please, I am not quite clear on the ruling of the Court. My understanding is that by order of the Court the action over has been severed from the principal action.

The Court: It is true, but severed in the sense of the fact trier's determination.

Mr. Friedman: Yes.

The Court: In so far as the evidence to be received before this jury may throw any light upon [7] the issues in the third party action to recover over against the United States, this presiding trial judge is at any and all times acting as the trier of the fact.

Mr. Friedman: I understand.

The Court: And the jury is not acting as the trier of the fact.

Mr. Friedman: Is Mr. Staring entitled to cross examine the plaintiffs in their case in chief against Orion? That's what I'm not quite clear on.

The Court: He certainly is. Is there anything else to be noted? I will ask at the proper time that Counsel for the plaintiffs make a very brief state-

ment of the nature of each case so far as the issues as between the parties are concerned and as those issues are disclosed by the pleadings, and to state the identity of the parties, Counsel and witnesses who are expected to be connected with this trial, with a view to trying thereby to assist the prospective jurors in manifesting their qualifications to act as trial jurors in these particular concolidated cases.

I now ask the clerk to call a jury to try these consolidated cases.

* * * * *

The Court: Is there anything to be done in the absence of the jury?

Mr. Staring: If your Honor please, I thought it might save the Court and Counsel a little time if the Court would make an order that the government's continuing objection to all testimony and evidence in this case be deemed to run to any testimony or evidence offered on the grounds of incompetency, irrelevancy and immateriality to any issue as between Orion and the government in this case, and upon the further ground that we object to its being taken before the jury or in a case in which a jury is empaneled, and if that objection could be deemed by your Honor to run throughout the case it would be unnecessary for me to go ahead and take up the Court's time and Counsel's time.

The Court: Do Counsel object to the Court's granting the request stated by Counsel for the United States?

Mr. Friedman: No objection, your Honor.

Mr. Vance: No objection, your Honor. [12]

Mr. Spellman: No objection, your Honor.

Mr. Holland: No objection, your Honor.

The Court: The Court is agreeable to having that understanding; that is, that the objection continue throughout the trial so long as this jury is functioning.

Mr. Staring: Thank you, your Honor.

The Court: And the Court overrules the objection as of this time and as of all other times material to the preservation of the objection by government Counsel. Bring in the jury. The Court prefers, of course, to hear the opening statements of plaintiffs' Counsel and defendants' Counsel may at that time or at some proper later stage of the trial make the defendants' opening statement. [13]

* * * * *

(The following proceedings were had without the presence of the jury:)

The Court: I believe now we can hear you.

Mr. Staring: If your Honor please.

The Court: Mr. Staring. [113]

Mr. Staring: The evidence will show that on August 17, 1953, the SS Sea Coronet was a privately owned and privately operated cargo vessel; that on that date she was present at Quay 2, a regular pier or wharf in the Port of Pusan and within the territorial limits and within the jurisdiction of the Republic of Korea, a foreign country. The evidence will show that at that time and place she was receiving a quantity of material

owned and possessed by the United States which was billed and signed as scrap material consigned to Yokohama, Japan, and which was being loaded aboard the Sea Coronet by Korea Heavy Lift Corporation, an independent contractor. The evidence will show that in that scrap were a number of chlorine flasks marked Empty and considered to be as marked by everyone present and concerned, whether on the quay or on the ship.

The evidence will show that one of those flasks in fact contained some chlorine, and that while it was being loaded aboard the ship the valve or some part of it broke and chlorine escaped. I believe the evidence will fail to disclose any agent or employee of the United States of America who was present at that time and place having knowledge of the risk of the presence of that chlorine gas or [114] any reason to inquire about the possibility of that risk. The evidence will fail to disclose any United States agent or employee present who failed to take any and all appropriate safety measured required by the nature of the scrap cargo that was believed by all present to be in the course of being loaded.

The evidence will show that all the flasks, all the chlorine flasks in that scrap material were carried by the Sea Coronet to Yokohama, Japan, and were discharged there and are not now within this district.

The evidence will show that all the acts complained of, whether they occurred on the shore, on the quay, or elsewhere ashore or on board the Sea

Coronet, occurred in a foreign country, namely Korea.

Finally the evidence will show that Orion Shipping and Trading Company, the defendant and third party plaintiff here, is a New York corporation and a resident of New York, not a resident of the Western District of Washington.

Based upon those facts we believe that your Honor should deny jurisdiction over the United States in this case. [115]

[Endorsed]: Filed August 28, 1956.

[Title of District Court and Causes Nos. 3623, 3792, 3791, 3617, 3624, 3728, 3793.]

COMPLAINTS OVER PROCEEDINGS

Be it remembered that the mater of the complaints over proceedings in the above entitled and numbered causes was heard before the Honorable John C. Bowen, one of the Judges of the above entitled Court, beginning Friday, July 27, 1956, at 10:00 o'clock a.m.

The defendants and third party plaintiffs were [1] represented by Mr. Robert V. Holland, of Messrs. Bogle, Bogle & Gates, Attorneys at Law.

The third party defendant was represented by Mr. Graydon S. Staring, Attorney, Department of Justice, and Mr. Francis N. Cushman, Assistant United States Attorney.

Whereupon, the following proceedings herein were had and done, to-wit: [2]

Friday, July 27, 1956, 10:00 o'clock a.m.

(All parties present as before, except plaintiffs and their Counsel.)

The Court: In the cases of the so-called Orion Shipping and Trading Company group, one of them is the Aregood case, and there are others, are the parties, Counsel and witnesses ready to proceed with that part of that case which concerns the action over against the United States of America?

Mr. Holland: Yes, your Honor.

Mr. Staring: Subject to all objections already made the United States is, your Honor.

The Court: That is true, is it, with respect to all of those cases which were consolidated for trial before a jury recently and which resulted in verdicts for the plaintiffs against the named respondents in those jury trials?

Mr. Holland: Yes, your Honor.

Mr. Staring: Yes, your Honor.

The Court: What is the lowest number?

The Clerk: 3617, your Honor, but the record was filed in 3623.

The Court: The cases being numbered 3617, [3] the Holmes case; 3623, the Aregood case; 3624, the Lewis case; 3728, the Mitchell case; 3791, the Basnight case; 3792, the Morriss case, and 3792, the Wilcox case. The respondents Orion Shipping and Trading Company, a corporation, and others, respondents, being in this action before the Court today cross-plaintiffs, I guess you would call them——

Mr. Holland: Third party plaintiffs, your Honor.

The Court: All right, cross party or third party plaintiffs, may now make their opening statement of what they think the proof will be in this action, or such third party plaintiffs may otherwise proceed at this time.

Mr. Holland: If the Court please.

The Court: Mr. Holland.

Mr. Holland: Preliminarily it was the understanding of the respondents at the time this matter was continued at the termination of the principal cases that the argument with the government would be towards the middle or the latter part of August, in my recollection. At the time of being advised by the Court on Monday of this week or Tuesday of this week that the matter would be heard today, I had already prepared but had not yet served and filed a request [4] for admissions upon the government. I filed the requests on that very day. Mr. Staring states that he does not object to the shortness of time for answering the request for admissions but states that he cannot admit to all of the facts therein contained, and to the extent that objection is made by the government to the facts contained in the request for admissions the respondents would request the Court for either a continuance or additional time at a later date to prove those facts which the government Counsel cannot agree to.

The Court: The only thing, Mr. Holland, is that if the Court is convinced that there is real prejudice, and it would be difficult for me to do so because my understanding of the trial date was sub-

ject to this condition, that if the Court's Bellingham or other calendar affairs made it possible, it was subject to the Court's calling the matter up for this further proceeding as soon as it was convenient to the Court, and if there is any real prejudice about the matter I will hear it. I do not want any more piecemeal trials on anything. I want to clean up instead of dismembering and delaying in part any litigation. I want to get the thing cleaned up. What is the prejudice?

Mr. Holland: Well, perhaps, your Honor, [5] this argument will bring out what prejudice if any exists. Actually none may exist, and if it does not we need not consider the matter further. May I renew my motion in that event then?

The Court: Yes, you may move at any time for anything and the Court will consider it, Mr. Holland.

Mr. Holland: Secondly, if the Court please, Mr. Staring, the government Counsel, has stipulated with me to the fact that the SS Sea Coronet at some time following this occurrence was purchased by another company, Alaska Steamship Company; that it was renamed the Tonsina, and that the Tonsina has been in and out of this port during the pendency of this action.

Mr. Staring: If your Honor please, that is subject, however, to an objection on the grounds of its being irrelevant and immaterial. I contend that it does not matter whether the ex SS Sea Coronet has been in and out of this port during the pendency of this litigation.

The Court: Do you wish the record to show that as to every request for admission not yet disposed of or in some manner regarded by Counsel as being determined, that if the government makes a response to the request for admission it is without prejudice to the continuing objection of the [6] government that the request is immaterial and the answer is immaterial?

Mr. Staring: I would appreciate that, your Honor.

The Court: Have you any objection to that? The Court can always determine that.

Mr. Holland: No objection, your Honor.

The Court: That request for continuing objection is approved by the Court.

Mr. Staring: Might I suggest, however, that with respect to Mr. Holland's request for admission, the government has objections more specific than those general ones which are already made of record, and if the Court should not agree with us upon those objections the government stands ready, notwithstanding the shortness of time, to make its answer at this time, but——

The Court: How long would it take for you to present and to submit to the Court these objections?

Mr. Staring: I don't think it will take me more than three minutes, your Honor.

The Court: Very well. As I understand it, Mr. Holland for the third party plaintiffs has already made the requests effectively upon the United States, third party respondent, and the question

now is whether or not the third party respondent will be required to respond to those requests. Is that right? [7]

Mr. Staring: That is correct, your Honor.

The Court: What would be the order? Do you think that Mr.——

Mr. Staring: Since Mr. Holland relies upon this for part of his proof it seems to me we should argue it now and have it decided.

The Court: I wish to hear it.

Mr. Staring: If your Honor please, Orion has served on the government on July 24th a request for admission requesting the government to admit first the genuineness of a photostatic copy of a time charter party executed by Pacific Cargo Carriers Corporation and the United States of America dated July 3, 1952, a copy of which is attached to the request. Orion also asks the government to admit that the charter party was in effect at the time of the Korean incident and makes two further requests for admission as to relationships between Orion Shipping and Trading Company and Pacific Cargo Carriers Corporation. All these requests seem to center on the charter party.

Now, if your Honor please, these cases were brought in tort, and your Honor could look at the third party complaints in vain to find any suggestion of a breach of contract, any pleading of breach of contract. By this point in the case I think we [8] are entitled to know on what theory this case proceeds and under what jurisdiction it is claimed to proceed. There is no mention of any contract.

The matter is entirely one of tort. The elements would be different.

The Supreme Court has held in Matson Navigation Company vs. United States, 284 U. S. 352, that an action on a time charter party, such as this one is, must be prosecuted exclusively in admiralty under the Suits in Admiralty Act against the United States.

On these grounds, your Honor, we contend that the requests for admission of the facts and documents sought to be admitted are wholly irrelevant and immaterial to any issue presented by the pleadings in these cases.

The Court: I will hear your response as to materiality.

Mr. Holland: If the Court please, the third party complaint is drawn on the theory of tort and of negligence of the United States Army. The time charter party in its provisions concerning the respective duties and rights and liabilities of the two parties in the operation of the vessel in which the government was the time charterer would point out without the necessity of alleging a breach of said contract, would point out to the Court the duties of the government with respect to what [9] they did aboard the vessel and would be material in indicating whether or not they had failed to do that which not only was reasonable and proper under the general law of tort, but that which was set forth and embodied in the time charter party. We think for that reason it is relevant and should be placed in evidence.

The Court: Do you contend two things, one, that you base the right under the contract relationship spoken of in the Ryan decision that rises over and above the contract obligation?

Mr. Holland: Our ground of recovery is principally on the theory of what was in the Rryan decision which was outside an express contract.

The Court: And do you assert the right to have the remedy of relief for that right and the failure of the United States to recognize it under the Suits in Admiralty Act, or under what Act?

Mr. Holland: Under the Suits in Admiralty Act and the Federal Torts Act, if the Court pleases. We have alleged both Acts.

The Court: Is there jurisdiction under both Acts in this case against the United States?

Mr. Holland: We believe there is, your Honor, yes. [10]

Mr. Staring: If your Honor please, since the Ryan case has been mentioned I should like to mention what I deem an error about it. The Ryan case turns upon a term of a contract. The Ryan case is a case of breach of contract and interpretation of that contract.

The Court: I got the impression, and it is what I remember of the impression, I haven't read the Ryan case since this Aregood case—I have forgotten when the last time I read the Rryan case was. It was fairly recently but it has not been within the last three weeks, so I am depending upon my impression, and it is at least three weeks old, the last one I got. I got the impression as it lingers

in my mind now the last time I read the Ryan case, which was not less than three weeks ago, that it recognized this right of recovery over for some kind of an indemnity no matter whether the contract between the parties expressly preserved the right or whether or not it had some obligation which the law creates wholly independent of an outside contract.

Mr. Staring: If your Honor please, the Court I believe tried to make it clear that they were not because they had to avoid that not to come in conflict with the Longshoremen's Act, they had to avoid [11] any duty by implication of law.

The Court: All right.

Mr. Staring: They said the duty is a warranty —when you make a contract to load you mean you will load safely and properly. That is what the contract means.

The Court: I stand corrected, but I do think that the Court reserved the right to more explicitly rule upon the question as to whether the Court was left to determine whether the right was raised by operation of law and existed notwithstanding the Longshoremen's Act. They were leaving that for the future. Whatever they wished to do. It seems to me in regard to that the Court wanted to give consideration when the negligence which was the basis of the cause of action in the main suit was, so far as the relationship between the third party plaintiff and the third party respondent were concerned, the less active and not momentarily concurrent, but there was a right over,

and the Court is unable to sustain the objection made to the right to proceed here in this case and therefore overrules the objection of the government thus stated.

Mr. Staring: At this time, your Honor, I will make a service—— [12]

The Court: Of course there is no need of our taking up anyone's time to express surprise at a great legal tribunal of the world taking a view like this. It is the most extraordinary thing I ever heard of as a lawyer, but we have this decision and, like all other decisions, whether it is a rational one or a sound one or whether it seems to be from anybody's point of view on a very unsound basis, we have to accept it and have to try to interpret it. Needless to say, if I had had anything to do with making the law I would not think of a rule like this. I think it is the most troublemaking kind of a judicial legislation that I ever knew of, but we have it, and the Supreme Court has been admitted in recent times to have the authority to make such rules, and you and I have no way of changing them. And so I believe the Supreme Court indicated that it intended that this Court in this particular case and all others like it should apply that rule here, Mr. Staring, and I am going to do it as long as I can tell that it is a situation where I think reasonably that the Court intended that the principle of that Ryan decision should apply.

Mr. Staring: At this time I have served Mr.

Holland and will offer for filing the government's answers to the requests for admissions. [13]

The Court: I will try to apply that principle or policy which I last announced just as carefully and earnestly and unfailingly as if I myself was the one that first thought of this rule announced in the Ryan case and felt it was the wisest and most just and best authorized and the most documented as to previous authority in the world, as long as I am performing the duties of this court.

Mr. Staring: With respect to Mr. Holland's proposed stipulation as to the Sea Coronet's entering this district during the pendency of this suit, I want to make sure that I have effectively objected that the presence of the Sea Coronet here in this district, which I understand Mr. Holland wants to establish for purposes of showing compliance with the Suits in Admiralty Act, is irrelevant and immaterial under that Act since in this case there is no attempt to charge a government vessel. The Sea Coronet is not a government vessel. There is no attempt to charge it with liability, so its presence here is immaterial. The presence of the cargo sought to be charged is material. The presence of the suitor itself, the presence of Orion, is material, but subject to that objection I will certainly agree that the vessel has entered the district within the pendency of the suit and not at any [14] specified dates which I don't know.

The Court: Of course, Mr. Staring, if one had the duty to prove that the cargo was present, one of the best ways in the world to prove that the

cargo was present in the district is to prove the presence of the vessel on which it was.

Mr. Staring: Your Honor, the presence of the cargo has already been proved in the case by admissions of Orion. The cargo was discharged in Japan and has never been in this district, and that is admitted. We are speaking of the cargo and not some subsequent cargo which the ship might have carried.

The Court: What is it you are admitting, then, that is material here?

Mr. Staring: I don't believe that any of it is material. Mr. Holland wants it in the record and I am willing to admit that it is a fact, but I object that it is utterly irrelevant and immaterial.

The Court: Mr. Holland, what is it that makes it material? You are not suing the vessel or you do not claim that the vessel was the thing which was the basis for the provisions of the Suits in Admiralty Act for providing jurisdiction in personam against the United States. What is it which you seek?

Mr. Holland: Well, if the Court pleases, [15] our claim of liability against the government is based both against its vessel, referring to the fact that the government time chartered the vessel, and also the cargo. The fact that this was not a government vessel or a government owned vessel is immaterial, at least under some cases on the point, for example 65 Federal Supplement 191, where the Court said that the United States would be liable for a personal injury or illness to the seaman where

the vessel was only time chartered by the United States, and we feel that——

The Court: Where it was under operative control of the United States?

Mr. Holland: No, your Honor, it was time chartered by the United States. It was operated by another agency.

The Court: By "time charter", do you contend that even though one is not the owner it is the time charterer owning the right to dispose of the vessel under a time charter party's terms which in some respects make it for the time being the owner of the vessel and the user of the vessel in the way that it sees fit to use it, is that what you contend, that that is all that is necessary?

Mr. Holland: That is correct, your Honor.

The Court: Mr. Staring, will you answer that point? [14]

Mr. Staring: If your Honor please, I think that to answer this it is only necessary to look at the scheme of the Suits in Admiralty Act. The Suits in Admiralty Act is to provide a remedy against the United States for damages—I'm speaking of damages caused by its vessels and its cargo.

The Court: As offending things?

Mr. Staring: As offending things. Now, I don't mean by that to imply that it is limited to in rem rights. It has been held by the Supreme Court that it is not. But when the Suits in Admiralty Act contemplating suits against the United States provided that such suits shall be brought in the district where the parties so suing or any of them

reside or have their principal place of business, or in which the vessel or cargo charged with liability is found, they don't mean the vessel charged with liability by somebody else, they mean the vessel which forms the basis of the charge of liability against the United States.

Now, in this case plainly the emphasis is on cargo. The thing which is charged with liability in this case in the sense of this lawsuit is the cargo, not the vessel at all, and it's the location of the cargo that counts. It doesn't make any sense in [17] view of the purpose of this statute to decide that Orion is operating the vessel for the purpose of being sued by these libelants but then in some mysterious way Orion can sue the United States because at Orion's wish the United States is now operating the vessel. It's the cargo Orion is trying to charge with liability.

The Court: Hasn't the cause of action which has been asserted against the respondents in the jury tried cases turned out to be the very same cause of action, the very same wrong that was done by these persons who were sued as respondents in the law action before the jury which is asserted now, according to your theory, against the cargo? Is it in truth and fact the very same affirmative act, whether it be regarded as having been done by somebody in person or by the offending thing?

Mr. Staring: No, your Honor, I believe it is not. In the jury actions what was established was either that the SS Sea Coronet was unseaworthy or that Orion and Pacific Cargo Carriers were

negligent, or both, with respect to matters on which testimony was given, your Honor, occurring on board that ship.

Now, there was no testimony in the case, there has been none showing how that cargo got aboard the ship in the condition in which it was, what [18] might have occurred on shore, who might have done it, or where.

As I understand it, the claim that Orion makes against the United States is based upon the bringing of that cargo on board or collateral matters such as failure to give warning or post guards or matters of that sort, but it is a charge of neglifence and fault in officers and employees of the government. Orion has not been held liable in this case at all for any negligence or fault of officers or employees of the government. Orion has been held liable by this jury for negligence or fault of its own employees.

The Court: Under the charter party it owed a duty, and if that duty has not been performed would not the United States be then subject to being sued under this Ryan Act case, and if the cargo in question had been in the jurisdiction of this Court would not the United States then be suable here as a place of proper venue?

Mr. Staring: Well, let me say, I don't want to go into the Ryan case again, your Honor, I think that in some circumstances the United States would have been suable without the Ryan case. I don't think, in short, that the Ryan case has changed a single thing about this suit. There was a time [19]

charter, it is admitted now, there was a time charter relationship between the United States and Orion. It could have been contended by Orion, and I think maybe this is the time to say very candidly, your Honor, that the United States throughout this suit has not contended that Orion was without any remedy against the United States; that if the United States had been in fault the United States was entitled to prevail nevertheless simply because no remedy was provided. A remedy is provided. The relations of these parties with respect to cargo are governed by a charter party, just as in the Ryan case a contract was in the case and it was a question of interpreting it.

Now, there is a charter party here, and the Supreme Court says that in such a case where the relations of the parties are governed by a charter party you may only sue in admiralty pursuant to the Suits in Admiralty Act. Orion therefore could have brought its suit and has its remedy, very frankly, in the Southern or Eastern District of New York by a single suit in admiralty alleging the existence of all these suits and the possible further damages from similar suits. The remedy is provided, but this is not it, and every effort is being made here to strain this into the remedy [20] provided. It is not. The exclusive remedy is in admiralty under the Suits in Admiralty Act back in New York where Orion resides.

Now, if the cargo, that chlorine flask which offended, had been here in the Western District of Washington, yes, I agree, Orion could then have

filed a suit in admiralty against the United States in this District, but that wasn't the case. The cargo was never here and Orion never resided here. This was not the place, and furthermore they haven't even tried to bring a suit in admiralty. This is not a suit in admiralty.

The Court: Mr. Holland, did you wish the record to show your final statement?

Mr. Holland: Yes, your Honor. Going back to our original problem, which was whether or not we are suing the cargo or are suing the vessel, the allegations of the third party plaintiff against the government claimed negligence and carelessness in loading aboard the vessel a cylinder full of chlorine gas and treating it as a part of the scrap aboard the vessel and failing to take the proper precautions to prevent the escape of the chlorine gas, also in failing to maintain a proper security watch, to give appropriate warning of the escape of the gas.

Now, all of those alleged acts of negligence [21] cannot be said to force us to go only after the specific piece of cargo which is the offending object. It's no different than if a part of the government-loaded cargo had fallen on somebody through negligence of one of their other men; we do not have to go after the cargo. We can go after the government under the Suits in Admiralty Act, the vessel or its cargo, and since under the Penario case even though the vessel is time chartered by the United States Government and has, as your Honor phrased it, temporary control over the vessel as far as where it goes and what is loaded in

it, the mere fact the government is only a time charterer of the vessel does not mean that the government cannot be sued under the Suits in Admiralty Act in an attempt to fasten liability upon the vessel, because they were for that purpose in charge of the vessel, they did acts aboard which were negligent, and we may sue the vessel under Suits in Admiralty because of that negligence. Likewise we may also name the cargo.

The Suits in Admiralty Act is alternative. The vessel or its cargo are exempt from attachment, which is the purpose of the Act, and as a counter remedy for the injured plaintiff they may file this libel in personam, and it is not necessary that we [22] prove that both vessel and cargo or just merely, as in this case, because it was a piece of the cargo that caused the damage, it is not necessary that we prove the cargo was in the area. The operation being done aboard the vessel at the time by the United States Government and in their acts which we claim were negligent are sufficient to permit us to sue the vessel under the Suits in Admiralty Act by this means of a libel in personam.

Now, that was the problem we were facing, as to whether or not the vessel's presence is material, and also whether or not the absence of cargo from this area is fatal.

Mr. Staring: May I clarify one thing, your Honor, which has arisen?

The Court: You may.

Mr. Staring: I think we have fallen into a pit-

fall. We are talking here a little too much as to whether this is a suit in rem against vessel or cargo. I'm not trying to elect for Mr. Holland or Orion whom he is suing and what for. Our position is simply that if there is a suit against the United States, it must be brought where the Act says.

Now, if Mr. Holland is charging the cargo with liability, then it can't be brought here, if he [23] is charging that that is the basis of his venue. If he is charging neither ship nor cargo, then he has left only the residence of the third party plaintiff, which is in New York, and if he is claiming his venue on the basis of charging the ship with liability, he gets into the curious position of saying that the government was somehow negligent in operating the Sea Coronet when the evidence shows that in fact Orion was operating it and the judgment against Orion has proceeded on the basis that Orion was negligent in operating it.

Now, what kind of legal abracadabra is this, that you can operate your ship negligently and then by some legal fiction claim that somebody else was negligent and claim over from them?

Mr. Holland: I will just say, your Honor, that the jury did not say whether or not their verdict was based on negligence or on unseaworthiness.

In answer to Mr. Staring's argument, it could well have been based on unseaworthiness which was a condition caused by the government and which could well have been not from any negligence on the part of the vessel, so we're not saying in the

same breath that the vessel isn't negligent and that the government is. [24]

The Court: The Court believes, no matter what the reason is, that under the Ryan case doctrine this action over properly lies and that it is properly a suit so far as venue is concerned that may be placed on the provisions of the Suits in Admiralty Act, and that whatever it was that plaintiffs were suing for against the defendants in the plaintiff's jury action, the doctrine of the Ryan case is that for that there is a remedy over case, it is the kind of a cause of action as to which the Ryan case says there is an action over, and that in so far as the plaintiffs asserted and the jury could have taken the view that the offending thing in the process or one of them was the cargo itself, and I personally think under the evidence it was, that there isn't any question but what the government's cargo, having been once here, as was said by Mr. Staring,——

Mr. Staring: No, your Honor, I never said that. It has never been here. The cargo has never been here.

The Court: Has the vessel been here?

Mr. Staring: The vessel without the cargo has been here, but the cargo has never been here.

The Court: Either one. I thought you said the cargo had been here. [25]

Mr. Staring: No. I may explain for the record now that the cargo was discharged in Japan and has never been here.

The Court: The vessel was here and it was one

of the things with respect to this cargo and its carriage was in operation according to the evidence which was submitted to the jury, and the Court overrules the objection. The Court on the theory of immateriality asserted by the objector overrules the objection, the Court believing that the answers to the requests for admissions are or might be material.

Mr. Holland: As I understand your Honor's comments, I need not argue then the alleged lack of venue under the Suits in Admiralty Act or the applicability of that Act to this claim for——

The Court: I thought we just disposed of that.

Mr. Holland: Yes, that's my understanding, your Honor.

The Court: I thought we just disposed of that.

Mr. Holland: Yes. Then, your Honor, I think in view of that we need only discuss the evidence as respects the alleged liabilities of the two parties.

The Court: As bearing on the question of [26] the right to have these requests——

Mr. Holland: No, no, your Honor, on the main question of——

The Court: That is, the merits.

Mr. Holland: Yes, your Honor.

The Court: I don't know what the record is as to what you are presenting to the Court in the way of facts. I don't know what the record is on which you seek to argue now just before submission of the case.

Mr. Holland: Oh. Well, your Honor, in view of the government's admission on the genuineness

of the time charter party may we have marked the photostatic copy which is in the file and which was a part of that admission.

The Court: Just a minute. Does either litigant in this third party action over wish to make an opening statement of what the proof will be?

Mr. Staring: No, your Honor.

The Court: Do you, Mr. Holland?

Mr. Holland: Very briefly, your Honor.

The Court: Do it now.

Mr. Holland: I'll make that now. Your Honor, the respondents Orion and Pacific Cargo Carriers will show in their evidence that the negligence if any [27] of the respondents, the vessel operators, was only in the lack, as alleged in the plaintiff's complaints, the lack of the security watch and the insufficient time during which the men were not given warning to leave the vessel.

The evidence will show that immediately after having been advised of the presence of the gas Mr. Mitchell, the security watch on board the vessel who at the time was on his rounds, immediately went to the Third Mate; that the evidence will show the Third Mate immediately went to the Chief Mate; that the Third Mate then rang the alarm bell and the men were warned to leave the vessel.

On the appropriateness of the security watch the evidence will show or the evidence has already shown that the normal port security watch was on the vessel that night between the hours of 4:00 to 12:00 and that it consisted of the Third Mate who

was on watch and Mr. Mitchell who was the seaman who was on watch as part of that security watch.

The evidence will show or has already indicated that the entire operation being carried on at the hatch where the gas escaped was being done by the Army and that the ship had no duties whatsoever in connection with the loading of that cargo. [28]

I think the evidence will show that these are the facts which are to be considered by the Court in determining whether there is a right to full indemnity.

The Court: The third party respondent may now make its opening statement if it wishes to, or it may reserve it or it may entirely waive it.

Mr. Staring: If your Honor please, I would like to reserve all statements until the time of argument.

The Court: What is it then in connection with the proof that you are going to offer? I would like to know what it is that is answered in response to this request. Where are the requests for admissions? I want to see the one as to what is asked about whether or not the vessel or the cargo has been in this District. As the Court has already indicated in the Court's last remarks in response to the corrective statement that Mr. Staring made about the presence of the cargo or the lack of presence of the cargo in this District, it makes no difference which one was present if either one was, and that is admitted. In my opinion the Court has jurisdiction of this third party over action against the United States.

Mr. Holland: If the Court please, that is [29]

being introduced at this time, as I indicated, by a stipulation with Mr. Staring that such was the fact.

The Court: What is it that is the fact, that the vessel was here or the cargo was here, or both?

Mr. Holland: That the vessel was here during the pendency of the action. That is the stipulation.

The Court: It should have been here at the time of the commencement of the action, should it not, if jurisdiction is founded upon——

Mr. Holland: No.

Mr. Staring: That would be our position, your Honor, and I reserve our position on that.

The Court: You either have to have the thing here or you have to have the United States as the owner of the thing here. and the time when the thing was here that is important is the time of the commencement of the action, like in any other in rem proceeding. Is that not true?

Mr. Holland: No, your Honor, that is not true. First of all, this is not an in rem proceeding, and as stated in the brief which we filed initially in answer to the government's motion, in W. R. Grace and Company, for example, it is stated that an action [30] will lie under this Act although the vessel has disappeared, and there are other cases which state that if it is in the area at any time during the pendency of the action it is sufficient to establish jurisdiction.

The Court: Isn't one of the material allegations of the libel that the vessel or the offending thing is within the jurisdiction of the Court? Isn't that

one of the material allegations under the Suits in Admiralty Act?

(No response.)

The Court: I ask you if one of the material allegations of the Suits in Admiralty Act is not, where it is with respect to the in rem liability of an offending thing like a ship, one of the material allegations is that the ship is now present in the district?

Mr. Holland: With respect to an in rem proceeding, your Honor, it is necessary that such be alleged. With respect to an in personam proceeding such as this——

The Court: I am talking about under the Suits in Admiralty Act where you sue the United States in lieu of the offending thing.

Mr. Holland: Yes. This is an in personam [31] proceeding.

The Court: Does not the Suits in Admiralty Act say that you sue where the offending thing or where the vessel is?

Mr. Holland: That is correct.

The Court: Do you say that in this case?

Mr. Holland: I do not say it is necessary to allege that fact, your Honor. That fact is now in evidence, the fact that it was in the district.

The Court: At some time during the pendency of the action?

Mr. Holland: Yes, your Honor, that is correct.

The Court: Which makes the allegation true, is that—well, maybe it wasn't true at the time it was made but it became true during the pendency?

Mr. Holland: It is our contention, your Honor, that it may not even be alleged in an in personam proceeding, and it is the evidence now, your Honor, that the vessel was in the district.

Mr. Staring: May I have a moment, your Honor, to consult the amended third party complaint?

Th Court: Yes, you may.

(Brief pause.)

The Court: This reminds me of the trial [32] judge who thinks he has some experience in admiralty matters and one of the most experienced admiralty lawyers in this city the other day not remembering clearly whether or not the third party respondent under Rule 56 in a recovery over proceeding becomes liable to a libelant if he appears and answers, as he is required to, the libel.

Mr. Staring: Your Honor, in the amended third party complaint filed in these cases there is no allegation of any location of the ship whatsoever nor any indication that venue is being based upon the location of the ship.

Now, it is held under the Act, as your Honor correctly recalls, that venue has to be pleaded, you have to show the basis under which you bring your action in this district. There is no mention of that. There is no mention that either ship or cargo was here, and certainly no mention that Orion Shipping and Trading lives here, which it is admitted not to be. The vessel was not mentioned and the cargo was not even mentioned in this suit as being here.

Mr. Holland: In conformance with the proof

which is now before your Honor then, if that be the case, the respondent would move to amend their third party complaints to allege that the vessel was present [33] in this district during the pendency of the action.

Mr. Staring: I would object to such an amendment at this stage of the proceedings.

The Court: Was it received without objection at the time it was offered?

Mr. Holland: It was, your Honor, and there was no objection as to the absence of such an allegation. Comments were made by government Counsel that the cargo was not present. No contention was made by Counsel that the vessel was not present, to my recollection, in their briefs, and they certainly are not surprised by our now moving to amend.

Mr. Staring: If your Honor please,——

The Court: If the record now shows, no matter whether by an admission to a request for admission or whether it is shown by someone's testimony, some witness' oral testimony, or whether it is shown by some document, if it is now in the record without any objection from the United States of America at the time it went into the record——

Mr. Staring: Your Honor, I made the——

The Court: ——why then I assure you that it would be in my opinion error for the Court not to grant the amendment, because it is already made by operation of law. [34]

Mr. Staring: Your Honor, the only time that the matter has gone into the record was here this morning when objection was made by me and fully

argued to your Honor that it was irrelevant and immaterial that the ship was in this district.

Now let me say that last year, when motions to dismiss in these cases were argued to your Honor, one of the grounds of the motion made was the failure to allege facts showing venue in this district, and I understand it is not necessary to repeat that in an answer. The motion was denied and the point is preserved, and now at this point they seek to amend and allege a new ground of venue, and the only evidence on it was objected to by me here this morning because it was not based on anything in the pleadings.

The Court: I did not understand that it was on the insufficiency of the venue allegation. I thought you based it on the fact,—put in this way, my understanding of your position was that it was not clear that he was suing the United States in personam in lieu of the offending thing which has been within the jurisdiction.

Mr. Staring: No, my objection was that the bringing of the ship into the jurisdiction, which I said at the time I suppose Mr. Holland is interested [35] in proving that the purposes of venue, and I said, "I don't think it has anything to do with venue and it is irrelevant and immaterial." It is based on the venue provision of the Suits in Admiralty Act only is why I objected, and I tried to make it clear later not on any supposed distinction between in rem and in personam under the Suits in Admiralty Act.

Mr. Holland: It was my understanding, your

Honor, that the objection was because it was Counsel's opinion or thought that we were suing the cargo and that therefore the presence of the vessel was immaterial. That was my understanding.

Mr. Staring: I got up and corrected that.

The Court: I am not going to take any chance on construing over the objection of objecting Counsel what he meant by an objection. He objected to the venue this morning before he effectively made this admission in response to the requests for admissions, and I don't think the Court has a right to say now that the aspect of his objection to jurisdiction was not the one that is now in question. I just don't think that is right. I don't think the Court could truthfully say that the record now shows without objection from the third party defendant United States that the vessel was in the jurisdiction during the [36] pendency of this action, Mr. Holland. I don't see it. I don't see that in the record. If there had been some witness on this stand or if there were some evidence equivalent to it who without any objection from Mr. Staring had said, "Well, I went aboard that vessel in Elliott Bay the second day after that action to recover over was filed," and Mr. Staring never had objected to it at all, why then in my opinion Mr. Staring for the third party respondent could not be heard to object now that it was not proved. The record in my opinion would in that situation show a fact which in and of itself by operation of law amend the pleadings, because the law in this jurisdiction says, in state practice and this federal practice also which follows the

state practice in that respect, that if a fact is proved, even though it is not specifically alleged in the pleading, thereupon the pleading by operation of law becomes so amended in accordance and in harmony with such fact. I cannot say that here because he has been objecting to your right to prove the venue by his admission in this fashion on the ground that he said that it was not within the pleading. He has said that here this morning.

Mr. Holland: Well, if the Court please, the purpose of our attempted stipulation was to save the [37] time of the Court and have a witness who was prepared to come up and so state, and as far as the proceeding here it may be treated just as though the witness were here, with the agreement of Mr. Staring, as though the witness were here and did so testify.

The Court: That is for Mr. Staring to say. That is not in the record.

Mr. Holland: Well, Mr. Staring stipulated that the witness would come and so testify. He, however, made his objections, which was proper.

Mr. Staring: I objected that it was irrelevant and immaterial. I said if the Court ruled against me that it was relevant upon some basis found in the pleadings, why then I would agree to save the time of the witness, but the so-called stipulation is subject to the ruling of the Court.

The Court: Again I have no right to say what each Counsel understood his own oral words to be. Counsel made a mistake not to have it in writing. If you had it in writing I would have some right

to say what the written words mean, but I cannot say what Counsel in their oral words meant to say about a thing of this sort. I don't believe the Court has any right to, especially if there is a dispute about what the oral words exactly were. It is just too risky a thing [38] for the Court to assume the responsibility to say whose recollection is right as to what the words were or what they meant. It isn't right, and I don't see any allegation here, in view of the state of the pleadings, that that vessel was here during the pendency or that the cargo was here during the pendency of the action. Where are the words that say that?

Mr. Holland: There are no such, your Honor.

The Court: And those words are not in the statement of allegations as to venue unless the pleading of the third party plaintiff is amended by an answer which was made under compulsion and over the objection of the third party respondent on the basis, among other things, that the venue was improper and was immaterial on the question of the allegation of venue. One of the first things Mr. Staring said this morning was that it was immaterial on the question of venue because of something like the cargo not being here. It seems to me that he then, though, did he not, admit that the ship was here?

Mr. Holland: Your Honor, the thing we are attempting to stipulate is merely to a fact, and that fact is that the vessel was here during the pendency of the action. Now, Mr. Staring agrees with that fact because to save the time of a witness

coming and [39] advising the Court of that fact. Beyond that he reserves all his objections.

The Court: Mr. Staring, did you not say, "I admit the ship was here?" Either that or you said—I thought you said the cargo was here, but you say it was not, and now you admit that the ship was here.

Mr. Staring: The record will show, your Honor, that my position was that I did not wish—if it were relevant and if Mr. Holland produced the testimony, I wasn't going to put him to the trouble of bringing his witness. I objected to any such proof on the grounds of irrelevancy and immateriality, and I said if I am overruled on such grounds I will agree that the ship came in here, if I am overruled.

The Court: Very well. It may be a very serious thing, but it is not half as serious as the Court running the risk of granting a judgment or granting relief to a suing party against one who objects to being sued and if that party contends, with some reason and with the state of the record to back him up, that there is no allegation nor any unobjected proof to support the venue of this Court.

Mr. Holland: We would then renew our motion to amend, your Honor, for the reason that no surprise comes to the government as the result of the present [40] inclusion of such an allegation if the Court deems such allegation necessary, which we do not believe is correct, but if deemed to be necessary we would then move to amend at this time, and I don't believe the government can show any preju-

dice or any surprise, since they have been present throughout the trial and throughout this case.

Mr. Staring: I will say I am surprised in just this alone, that I am surprised to find this matter being argued here this morning. I feel that at this time in the case we should at last have known under what jurisdiction we were proceeding and what this claim consisted of.

The Court: The Court finally sustains the objection to the trial amendment that was asked for to make the pleadings conform with the proof in view of the fact that all the proof is in a form of admission which was made over the objection of the admitter, namely the third party respondent United States of America, and one of the objections was that the answer to the request for admission if made would be immaterial because there was nothing in the then present state of the pleadings to make it material, and the present motion for trial amendment is denied because it is just tardily made. If Counsel were some inexperienced [41] pleader, some young man just out of law school, the Court might not take this view, but there are too many things connected with the case. Counsel could have looked the situation over the next day after these jury verdicts when he must have been faced with a decision as to whether he seriously should attempt to sue over against the United States of America, and he has had the time since the jury's verdicts until now to attempt to get his pleadings into condition and to bring any questions preliminary to it on for trial. It just isn't right.

What is the reason for the Court entertaining this action any further? Is there any reason why it should not be dismissed?

Mr. Staring: I know of none, your Honor.

Mr. Holland: If the Court please, the respondents at this time would move to be permitted until two o'clock to offer proof of the proper venue in this case.

The Court: You may put in the record your offer of proof.

Mr. Staring: And I will object to that.

The Court: The Court will accord you that opportunity, Mr. Holland.

Mr. Holland: At two o'clock? [42]

The Court: No, at 1:30. How long will it take?

Mr. Holland: The witness will just take one minute, your Honor.

The Court: Then just about five minutes before 2:00.

Mr. Holland: Five minutes before 2:00?

The Court: Yes.

Mr. Holland: Thank you, your Honor.

Mr. Staring: Do I understand that your Honor has not ruled that the evidence will be admitted but only that the offer may be made?

The Court: I say that he may have a right to make his record showing what proof he wishes to make will be. In other words, he may have an opportunity to make a record of his offer.

Mr. Staring: I understand, your Honor. Is it your Honor's order that the third party actions are to be dismissed?

The Court: That will be the order of the Court.

Mr. Staring: If so, may I prepare——

The Court: Will you present an order at that time?

Mr. Staring: May I present orders this [43] afternoon?

The Court: Yes.

Mr. Staring: Thank you, your Honor.

Mr. Holland: Would your Honor wish to hear argument under the Federal Torts Act, which is the alternative remedy sued upon here?

The Court: I thought everything was based on the Suits in Admiralty Act.

Mr. Holland: We plead alternative statutes, your Honor.

Mr. Staring: Your Honor will remember the case which your Honor decided a year ago in December of Reed vs. United States which turned upon the mutual exclusiveness of the Suits in Admiralty Act and the Tort Claims Act, and you will remember that your Honor dismissed for lack of jurisdiction under the Torts Act.

The Court: That was the hospital case.

Mr. Staring: That was the hospital case, because jurisdiction could have been had under the Suits in Admiralty Act. It's not only the decision of the Supreme Court on the Suits in Admiralty Act by itself that is exclusive, but it is set forth again to make doubly sure in the Tort Claims Act that if you can bring suit under the Suits in Admiralty Act you cannot bring suit under the Tort Claims Act. You have [44] to make a choice.

The Court: The Court will apply that rule here. Is there anything else to be said? Court will be recessed until 1:55 this afternoon.

There is one thing further I would like to say on the record, gentlemen. I am more content to make this ruling and better satisfied with the result thereof even though it may be a hardship on the third party plaintiffs suing over because after all there is some arguable objection to the propriety of the Court's maintaining this action in this situation, and the risks which the suing party, the party suing over, is taking by trying to obtain relief in this court, even if he should be successful, is so very serious that it makes the Court feel more content with the result of this ruling just announced because it is without prejudice to the right of these third party plaintiffs to sue the third part respondent United States of America in the proper district and in the proper venue.

Court is now recessed until 1:55 this afternoon.

(Thereupon, at 11:10 o'clock a.m., a recess herein was taken until 1:55 o'clock p.m.) [45]

Friday, July 27, 1956, 1:55 o'clock p.m.

(All parties present as before the noon recess.)

The Court: You may proceed in the case on trial if you are ready. Are all parties ready?

Mr. Staring: Yes, your Honor.

The Court: The case in which we were going to settle an order. Do you have an order that is approved as to form?

Mr. Holland: If the Court please, your Honor will recall that I was going to put on a witness.

The Court: You were going to make an offer of proof.

Mr. Holland: Yes.

The Court: You may do that now.

Mr. Holland: Mr. Wesson, will you take the stand, please.

LEONARD C. WESSON

called as a witness in behalf of defendants and third party plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Holland): Will you state your name, please? [46]

A. Leonard C. Wesson.

Q. Will you spell that? A. W-e-s-s-o-n.

Q. What is your occupation, Mr. Wesson?

A. I'm industrial relations representative for the Alaska Steamship Company.

The Court: Now make an offer of proof. I haven't time to hear the testimony.

Mr. Holland: If the Court pleases, the respondents make the offer of proof that this witness will testify that in the latter part of 1953 the SS Sea Coronet was purchased by Alaska Steamship Company from Orion Shipping and Trading Company; that the vessel was renamed the Tonsina, and that since the latter part of 1953 up to the present time that vessel has been in and out of the Port of Seat-

(Testimony of Leonard C. Wesson.)

tle on its regular run for Alaska Steamship Company. That concludes the offer of proof.

Mr. Staring: I will object to such proof upon the grounds of irrelevancy and immateriality.

The Court: The objection is sustained.

Mr. Holland: No further questions.

The Court: You may step down, Mr. Wesson.

The Witness: Thank you.

(Witness excused.) [47]

Mr. Staring: Your Honor, I have prepared an order and I have submitted it to Mr. Holland at this time.

Mr. Holland: If the Court please, in view of this matter having developed this morning, over the noon hour the respondent found two District Court cases in which this identical situation occurred in which the libel failed to allege the elements of venue and in which cases the Court——

The Court: I do not wish to hear further argument. The ruling will stand, unless you have a Supreme Court decision or a Circuit Court decision, Mr. Holland.

Mr. Holland: May I then state, your Honor, that the respondents before the entry of this order would move the Court under 28 U. S. C. A., Section 1406, that this matter, rather than being dismissed at this time, be transferred to the proper district. 1406-A reads that, "The District Court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interests of justice, transfer such case to any district

or division in which it could have been brought," and——

The Court: I do not see what would be gained by a transfer. [48]

Mr. Holland: For the reason, your Honor, to expedite the eventual settlement of the entire problem, that the matter would need not then be refiled in the Southern District of New York but may merely be transferred to be placed on their calendar for further handling.

Mr. Staring: If your Honor please, may I show your Honor what would happen to it upon its arrival in the Southern District of New York?

The Court: You don't need to show it. I don't see anything to be gained by the transfer. I don't understand what the difference is or any advantage to anyone by transfer or dismissal. Dismissal is without prejudice to starting the action tomorrow. There has not been anything done here that won't have to be done there all over again, so far as I can tell. What is there to be gained by transfer that would not be accomplished by bringing suit?

Mr. Holland: In the interests of justice, as the rule says, your Honor, the question of time, the respondents would not be permitted to institute their suits on the east coast until after the final result of the appeal in this case and until after the amounts and judgments have been paid. Suit cannot be brought at this time and would be premature because the respondents until such payment have not been damaged by the acts of the government, and any suit up to that time would be dismissed as prema-

ture. If, however, since they are in this impleading petition, it is transferred there for further handling, the matter could be carried on the calendar depending upon what would happen in the appeal.

The Court: Have you any authority for transferring an action over?

Mr. Staring: I've never heard of its being done, your Honor, and I call to your Honor's attention a recent decision of the Southern District of New York——

The Court: No, I do not care to hear it. I do not wish to transfer it. I wish to dismiss it, because it was improperly brought here, in my opinion.

Mr. Holland: If the Court please, as to the wording of this order, the respondents would request that the words "without prejudice" be inserted.

The Court: The Court wishes affirmatively that it be so worded, and the Court will undertake to put in the proper words at the proper place. Where do you suggest?

Mr. Holland: After the word "without on Line 2, Page 2, the words inserted "prejudice and without". [50]

The Court: "are hereby dismissed without prejudice and" is where I think it would be proper. Mr. Staring, have you enough copies of this order to file one copy in each of the other suits other than——

Mr. Staring: Yes, your Honor, we have copies for every file here and I am conforming them with the changes.

The Court: It seems like everyone who writes the names of these cases writes them in a different

order. I have never seen them written in this order before. I don't see why someone wouldn't have put either the smallest numbered case at the top of the list or else put the Aregood case at the top of the list.

Mr. Staring: I'm afraid, your Honor, we have fallen into the habit of following some pleading file along the line without being very critical of it and have continued to——

The Court: I wish you would file this order in the Aregood case, No. 3623, and then I wish you to file a copy, it can be an uncertified copy as far as I am concerned, I wish you to file a complete typewritten copy in every one of these other cases.

Mr. Staring: Yes, your Honor, as soon as I have made the change which—— [51]

The Court: Will you do it today?

Mr. Staring: ——your Honor has done I will immediately hand them to the clerk today.

The Court: Will you make that filing today?

Mr. Staring: I will make it within the next few minutes, your Honor.

The Court: And then if you have copies of everything except the Judge's name, have every word of the order except the Judge's name, you can write that in in longhand if you put the word or the sign for the word "signed" before the name. Just indicate that it is a copy.

Is there anything else which the Court should consider in this particular matter?

Mr. Staring: Nothing further, your Honor.

The Court: Those connected with this case are excused.

(Thereupon, at 2:05 o'clock p.m., an adjournment herein was taken.) [52]

[Endorsed]: Filed Sept. 13, 1956.

[Title of District Court and Causes.]

* * * * *

COURT'S ORAL OPINION

The Court: The Court now, as previously, is of the opinion that to grant the motion to transfer under the statute cited, 28 U. S. C. Section 1404 (a), would permit any litigant in the future to have a precedent for sitting by and letting the statute of limitations run in the district of jurisdiction after he willfully but wrongfully instituted an action in the wrong venue. Such a doctrine has never prevailed before, and it was not intended to prevail under this statute.

The running of the statute of limitations is a peril which every suitor has facing him when he selects, and it has always been so. In the past if, he selected the wrong forum, one not having jurisdiction, that did not toll the statute.

It seems to me to be wholly inconsistent with justice to permit any such result as that. Even in this case it could have been in the mind of the one suing over, although I do not believe it was, that it chanced the running of the statute while it had [2] knowingly chosen the wrong forum, upon the theory that Section 1404 (a) would apply and rescue the

party suing over from its own willful choice of the wrong forum, and if, as I believe, such an attitude was not considered and was not possessed by this party, nevertheless if such attitude had in fact been possessed, according to the theory of this party suing, over, it would be entitled to the same relief anyway which it here seeks, namely the right to transfer to the proper jurisdiction notwithstanding any such, if it were so, willful choosing of the wrong forum.

The Court adheres to its former ruling and denies each and all of these motions.

* * * * *

[Endorsed]: Filed November 15, 1956.

[Endorsed]: No. 15264, United States Court of Appeals for the Ninth Circuit. Orion Shipping and Trading Company, a corporation, and Pacific Cargo Carriers Corporation, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Northern Division.

Docketed: September 5, 1956.

Filed: August 23, 1956.

/s/ PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15260

ORION SHIPPING & TRADING COMPANY, INC., Appellant,

vs.

WILLIE B. HOLMES, and UNITED STATES OF AMERICA, Appellees.

No. 15261

ORION SHIPPING & TRADING COMPANY, a corporation, Appellant,

vs.

CHARLES E. AREGOOD, and UNITED STATES OR AMERICA Appellees.

No. 15262

ORION SHIPPING & TRADING COMPANY, a corporation, Appellant,

vs.

GEORGE E. LEWIS, and UNITED STATES OF AMERICA, Appellees.

No. 15263

ORION SHIPPING & TRADING COMPANY, a corporation, Appellant,

vs.

JOSEPH E. MITCHELL, and UNITED STATES OF AMERICA, Appellees.

No. 15264

ORION SHIPPING & TRADING COMPANY, INC., and PACIFIC CARGO CARRIERS CORPORATION, Appellants,

vs.

WILLIE B. BASNIGHT, and UNITED STATES OF AMERICA, Appellees.

No. 15265

ORION SHIPPING & TRADING COMPANY, INC., and PACIFIC CARGO CARRIERS CORPORATION, Appellants,

vs.

ARTHUR G. B. MORRISS, and UNITED STATES OF AMERICA, Appellees.

No. 15266

ORION SHIPPING & TRADING COMPANY, INC., and PACIFIC CARGO CARRIERS CORPORATION, Appellants,

vs.

BEN WILCOX, and UNITED STATES OF AMERICA, Appellees.

STIPULATION AND ORDER FOR CONSOLIDATION OF CAUSES

STIPULATION

It Is Hereby Stipulated by and between appellants and appellees in each of the above causes, which were consolidated in the court below for trial, for the purpose only of abbreviating the record in the instant appeals, that the above causes be consolidated for hearing on appeal, as depending upon common questions of law and fact, and that appellants need designate as the record which is material to the consideration of the instant appeals against appellee United States of America only portions of the record in Orion Shipping & Trading Company, Inc., and Pacific Cargo Carriers Corporation vs. Willie B. Basnight and United States of America, No. 15264, and

It Is Further Stipulated that the final judgment between appellants and appellee United States of America in the said cause No. 15264 be considered to be the law of the case in each of the other causes consolidated hereby as to all issues between appellants and appellee United States of America raised by the record in the said cause No. 15264.

BOGLE, BOGLE & GATES
/s/ ROBERT V. HOLLAND
Attorneys for Appellants
CHARLES P. MORIARTY
United States Attorney
KEITH R. FERGUSON
Special Assistant to the Attorney General
/s/ GRAYDON S. STARING
Attorney, Department of Justice
Attorneys for Appellee. United States of America
KANE & SPELLMAN
/s/ JOHN D. SPELLMAN
Attorneys for Appellees Willie B. Holmes and George E. Lewis
LEVINSON & FRIEDMAN
/s/ EDWIN J. FRIEDMAN
Attorneys for Appellees Charles E. Aregood and Joseph E. Mitchell
BASSETT, GEISNESS & VANCE
/s/ J. DUANE VANCE
Attorneys for Appellees Willie B. Basnight, Arthur G. B. Morriss, and Ben Wilcox.

ORDER

Upon consideration of the foregoing stipulation for consolidation of causes,

It Is Hereby Ordered that the above causes be consolidated for hearing on appeal; that appellants need designate as the record which is material to the consideration of the instant appeals against appellee United States of America only portions of the record in Orion Shipping & Trading Company, Inc. and Pacific Cargo Carriers Corporation vs. Willie B. Basnight and United States of America, No. 15264; and that the final judgment between appellants and appellee United States of America in the said cause No. 15264 be considered to be the law of the case in each of the other causes consolidated hereby as to all issues between appellants and appellee United States of America raised by the record in the said cause No. 15264.

Dated October 23, 1956.

/s/ WILLIAM DENMAN
Chief Judge

/s/ WILLIAM HEALY
Circuit Judge

/s/ WALTER L. POPE
Circuit Judge

[Endorsed]: Filed October 25, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Causes Nos. 15260, 15261, 15262, 15263, 15264, 15265, 15266.

STATEMENT OF POINTS

Come Now the appellants and pursuant to Rule 17 (6) of the Rules of the Court of Appeals for the Ninth Circuit and hereby make the following Statement of Points:

1. The District Court erred in sustaining the objection to the trial amendment requested to make the pleadings conform to the proof with respect to venue.

2. The District Court erred in sustaining the objection to the offer of proof concerning venue.

3. The District Court erred in denying the motion to transfer the third party action under the provisions of 28 U.S.C.A. 1404 (a).

4. The District Court erred in dismissing the third party complaint on the ground of lack of venue.

* * * * *

BOGLE, BOGLE & GATES
Attorneys for Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed November 9, 1956. Paul P. O'Brien, Clerk.